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ESSAYS

UPON

THE FORM OF THE LAW.

BY

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1870.

TO

THE RIGHT HONORABLE

RICHARD BARON WESTBURY,

This Volume

UPON A SUBJECT WITH WHICH HIS NAME

WILL EVER BE ASSOCIATED

IS

BY HIS PERMISSION

MOST RESPECTFULLY INSCRIBED.

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INTRODUCTION.

INTRODUCTION.

Two great Questions may be asked concerning any system of Law:—

I. Whether it is adapted to promote the welfare of the people among whom it is enforced.

II. Whether the knowledge of it is easily accessible.

The former has reference to the *matter* contained in the law; the latter to the *form* in which the law is promulgated.

A moment's consideration will show that, even if the material question is the more important, the formal question should precede it in order of time.

Before inquiring how far a body of laws is adapted to secure the end at which it aims, it is essential first of all to place beyond dispute of what that body of laws consists.

Although the Law of England is notoriously formless to a degree unparalleled in Europe, and is rendered annually more so by the copious addition to it of new matter by persons imperfectly acquainted with what it already contains, what we have called the "formal question" is only now beginning to attract attention in this country.

The Essays comprised in the present volume have been written exclusively with a view to making the importance of this question more prominent. Having been composed at different times, and having originally appeared, for the most part, in different periodicals, they occasionally touch more than once upon the same topic. For this, under the circumstances, scarcely avoidable tautology, the author can only ask the indulgence of the reader. He trusts, however, that the Essays derive from their common object sufficient coherence to justify him in combining them into something like a Treatise upon the Form of the Law.

The first half of the volume is devoted, as will be seen, to a consideration of the form of the Law of England generally, both written and unwritten; the second half to the form in which the results of direct legislation are promulgated in the Statute Book.

The Author has throughout endeavoured to show that such changes as are necessary should be effected after careful preliminary definition of terms, and in accordance with scientific methods of classification, rather than by means of the miscalled "practical" expedients to which the English mind has hitherto been so prone. The views, which it has been the aim of the Author to support, may be summarised in the following propositions:—

I. That the amendment of the form of the Law of England is a more pressing necessity than the improvement of the matter of which it consists.

II. That such formal amendment should, as far as possible, be conducted independently of material changes.

III. That the end to be aimed at in the formal amendment of the law is a Code, the objections to which are historically and theoretically unfounded.

IV. That a Code should contain but one system of Law; and, therefore, that no attempt should be made in a Code of the Law of England to exhibit incongruous laws which prevail in other portions of the British Empire.

V. That some clear conceptions and definitions should be arrived at of a "Code" and of a "Digest," and of the processes necessary for the formation of either one or the other.

VI. That in applying these processes to the different departments of Law, a distinction must be drawn between such departments as are founded upon statutes and have merely been interpreted or extended by the course of litigation, and those which, being essentially the product of the Common Law, have only been here and there modified by Acts of Parliament.

VII. That these departments should probably be operated upon separately, though upon a similar plan, and with a view to ultimate amalgamation.

VIII. That great pains should be devoted to the elaboration of a really scientific scheme for mapping out the different departments of Law, so as to exhibit their true relations to one another.

IX. That when the Code, or (as a step towards it) the Digest, is completed, all subsequent legislation should have direct reference to some specific title of the Code or Digest.

X. That the Code or Digest, as amended by new legislation and illustrated by new litigation, should be periodically revised and republished by authority.

XI. That independently of the great undertaking of digesting the whole Law, the statutes should be reduced to order forthwith. That with this view, the publication of the long-promised edition containing only statutes actually in force should be hastened. That this edition should then be weeded of all Acts which have no operation in England, or which are not really general law. That the residue should then be consolidated in accordance with the system of arrangement which would have been fixed upon for the Digest or Code of the whole Law.

XII. That subsequent annual legislation upon such subjects as are departments of the general law of England should be drawn and promulgated upon a new and uniform system, with special reference always to a particular title of the consolidated Statute Book.

PART I.

WITH REFERENCE TO THE LAW GENERALLY:

CONTAINING

I. A PLAN FOR THE FORMAL AMENDMENT OF THE LAW OF ENGLAND.

II. CODIFICATION.

III. A SPECIMEN OF A DIGEST.

I.

A Plan for the Formal Amendment of the Law of England.

(*Pamphlet*, 1*st March*, 1867.)

(*Dedicated, by permission, to Lord Westbury.*)

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A PLAN

FOR

THE FORMAL AMENDMENT

OF

THE LAW OF ENGLAND.

Matter and Form.

LAW REFORM has been in England hitherto taken to mean almost exclusively an amendment of the matter of the law. It is at length perceived that a remodelling of its form is at least equally important.

The one species of reform by no means implies the other; and although they have been very frequently combined in practice, it is submitted that much confusion has thus been caused, and that they should be, as far as possible, kept separate. There seems to be no good reason for delaying the re-arrangement and re-expression of the law till all debateable questions which have arisen upon its matter have been argued out and finally determined.

Terms to be defined.

In all discussions upon the formal improvement of the law, three terms of art are of constant recurrence: "digesting," "consolidation," and "codification," the indiscriminate use of which adds much obscurity to the subject. We shall be in a better position for attempting a definition of each of these terms, after briefly investigating the circumstances under which two of them were for the first time employed.

Preliminary Examination of the Reforms of Justinian.

The state of English law at the present time is, indeed, so closely analogous to that of Roman law in the fifth and sixth centuries, that in considering any proposed

improvement of the former, it would be a mere affectation of freedom from pedantry to neglect the lessons suggested by the latter.

The faults of English law now, as of Roman law then, are almost entirely faults of form. In point of matter, it is difficult to say which system deserves the higher praise.

The Sources of Law.

With the Romans then, as with ourselves now, the sources of law were practically two: the Imperial Constitutions, or, as we should say, the Statutes; and the writings of the great jurists, embodying what we should call the Common Law. Just as in our own case, their long series of statutes was arranged in no other order than that of time, and their common law had to be gathered from a vast library of authors, writing upon independent plans, and often differing in their conclusions. Out of these two sources of law, Justinian ultimately constructed two Digests of co-ordinate authority.

The so-called "Code."

One of these, containing the Statute law, was indeed called a "Code," but, as we shall presently show, it has no claim to this appellation, in the sense in which it will be most conveniently used. It was merely a new and very much more comprehensive edition of a similar Digest which had preceded it by a century, and is generally known as the "Theodosian Code."

The Digest.

The other publication attempted, for the first time, a Digest of the Common Law.

The Method of the Code.

To form the (so-called) Code, the principal heads or topics of law were selected, and subdivided into minor titles. A framework was thus made, the parts of which were all subordinated to the whole according to a preconceived method. Then all "Constitutions," irrespectively of the year of their promulgation, which had reference to a given head of law, were placed under that particular head; the Constitutions, however, in each title, or ultimate subdivision, being arranged merely in the order of the date of their publication.

The Method of the Digest.

The Digest, actually so called, was constructed much in the same way, except that, under each ultimate subdivi-

sion, the extracts from the writings of the jurists were arranged, not in order of date, but upon another arbitrary principle (*a*).

In both works the fragments of Statutes, and of Treatises, retained their independent existence.

Their common Object.

The essential character of both compilations was the same. Their object was to substitute a logical order of subjects for the disorder arising from the mere chronological sequence of the "Constitutions," and from the independent authorship of the Treatises.

Its Limitation.

This object was, however, pursued only to a certain point; and the ultimate subdivisions were, in each instance, left unorganic.

The Code and Digest of Justinian may be compared to statues, which have so far been hewn out of the marble that the arms are distinct from the bodies, and the hands are marked off from the arms, but the fingers are not yet separately defined upon the hands.

They should have a common Name.

Compilations formed upon so identical a method should surely, in the language of Jurisprudence, be called by the same name, irrespectively of any difference in the material which they may contain. They are both included under the definition which we shall hereafter give of the term Digest.

The magnificent Scheme of Theodosius.

Theodosius had, indeed, proposed to carry the same system a stage further. He intended to weave together the statute law and the common law into one compilation, which should supersede all other sources of authority, and assume the "magisterium vitæ" (*b*). This project came

(*a*) That, namely, which was detected by Blume, but which is immaterial to our present purpose.

(*b*) This noble idea, turgid as is the language in which it is expressed, deserves more attention than it has received: "Ex his autem tribus codici-
"bus (*i.e.*, his own, and those of Gregorianus and Hermogianus) et per
"singulos titulos cohærentibus prudentium tractatibus et responsis, eorum-
"dem opera qui tertium ordinabunt, noster erit alius, qui nullum errorem,
"nullas patietur ambages, qui nostro nomine nuncupatus sequenda vitanda-
"que demonstrabit. Ad tanti consummationem operis, et contexendos
"codices, quorum primus omni generalium constitutionum diversitate col-

to nothing, and even had it been carried out, would indeed have presented the Romans with one Digest instead of two, but not apparently with a Code, in the sense in which we shall use the term.

Points in which we should follow the Romans.

It is submitted that the Roman Emperors took the right course, and are useful for our guidance, in the following respects:—

(1.) That they began the formal improvement of the law by compiling Digests:

(2.) That they digested the Statute Law and the Common Law separately:

(3.) That they digested the Statute Law, without waiting till they had also digested the Common Law.

Points in which we should not follow them.

In the following respects it is submitted that they are not suitable for our imitation:—

(1.) That they did not contemplate ultimately carrying on the Digests into the more perfect form of Codes:

(2.) That their Digest and (so-called) Code were not arranged upon the same system:

(3.) That the system was in neither case either scientific or convenient:

(4.) That the Statute Digest was not forthwith perfected into a Statute Code:

(5.) That the ultimate amalgamation of Statutes and Common Law, though suggested by Theodosius, was never effected (*c*):

(6.) That no systematic provision was made for the incorporation into the Digests of the results of new legislation.

"lecta, nullaque extra se quam proferri liceat prætermissa, inanem verbo-"rum copiam recusabit; alter omni juris diversitate exclusa magisterium "vitæ suscipiet, deligendi viri sunt," &c., &c. Cod. Theod. Lib. I., Tit. I., 5.

(*c*) That is, before the publication of the Basilica.

The above estimate of the Roman reforms will, it is hoped, show the importance of defining the terms of art which are proper to this inquiry, and explain our reasons for framing such definitions of them as those which we are about to offer. Definitions.

A Digest is a distribution, according to a preconceived system, into books, titles, chapters and so forth, of a body of laws previously not so distributed; such laws retaining nevertheless the traces of their independent origin, and being, under the ultimate subdivisions of the work, arranged in a merely arbitrary order. A Digest.

The principle of its arrangement may be either logical or merely alphabetical (*d*).

It may contain either statute law, or common law, or both combined.

Its characteristic being—that all the large masses of law will be found in their proper places relatively to each other, but that the arrangement stops short of the final degree of finish. It is merely a mechanical arrangement of groups of laws (the ultimate groups remaining without any internal arrangement at all), not a conversion of a set of legal elements into a new product.

The statutes, or parts of statutes, which it contains are still entitled as separate enactments; and the paragraphs of common law will still appear as quotations from such and such a jurist, or such and such a decided case. So that a Digest never, as it were, speaks with its own mouth, but is merely a convenient arrangement of fragments of laws, each of which preserves its own vitality. It is in this sense of the term that we asserted that the Roman bodies of law were all Digests and nothing more. The Romans invented name and thing, and carried their invention to considerable perfection.

(*d*) In this way are digested the Maryland Statutes.

Consolidation.

Consolidation is the welding together into an organic whole of the various enactments or decisions which bear upon a given legal topic.

It is immediately applicable to statutes; but is inapplicable to common law as embodied in concrete cases, or in acknowledged quotations from treatises, although it doubtless might be applied to the net results of cases or treatises expressed axiomatically.

A Code.

A Code is a digest of which every title has been consolidated. Being a digest it is orderly; being consolidated it is homogeneous and organic.

It speaks with its own voice only, and retains no trace of the individuality of its constituent elements.

It may contain statute law, or the net results of case law expressed axiomatically, or both combined; but it cannot admit case law as such.

Though the name was invented, and used in a somewhat different sense by the Romans, the thing is of far more modern origin. Its best known example is the Code Napoléon.

The Romans never advanced beyond a digest: we in England have never yet got beyond consolidation. They began from the general but never attempted the final polish of the particular: we, on the other hand, have polished many particular topics of law, but have never grouped them under more general ideas.

The perfect Form of Law.

The most perfect form in which the law can be expressed is attained in a code, embracing both common and statute law, which, though it must be subsequently modified both by litigation and by legislation, yet affords a solid and a well defined ground plan for any future additions.

The Stages of Progress toward it.

Such a code is however rather to be aimed at as an ideal than to be sought as attainable by the present generation.

Short of this: the perfection of statute law would be obtained in a statute code.

The perfection of common law in a code of common law axioms.

But a code, of any kind, presupposes consolidation; and consolidation presupposes the selection of some principle of division and arrangement, which alone can determine the heads under which the law is to be consolidated.

Now such division and arrangement is the province of a digest; which should be therefore everywhere, as it was with the Romans, the first step in the re-expression of the law.

Practical Application to English Law.

It remains to apply the general conclusions at which we have arrived to the problem of Law Reform in England.

A Scheme of Classification.

The very first care of those in authority should be to select a scheme of legal classification, which shall be at once logical, suitable to the comparative importance of the conceptions upon which it is founded, and practically convenient.

This is perhaps the most important and difficult step in the whole process; the more so as it is most desirable that this identical classification should run through all the digests, and govern the distribution of the code of the future.

The scheme should be made as perfect as possible; so that, although a title may sometimes occur to which we have at present no rules of law corresponding (*e*), no portion of our law shall by any chance be discovered which shall be without an appropriate title for its reception. It may be safely said that no code or digest, from the Code of Theodosius to the "Code Civil" of Lower Canada, has as yet been even tolerably well arranged. Not one shows any conception of the mutual relations of the great departments of law; not one is governed by the logical principle of "dichotomy;" which, though it need

(*e*) ὥστε κενὸν ἂν εἴη τὸ εἶδος—as Aristotle would say.

not be always visible on the surface, yet should underlie and determine the main features of every system of classification. Logic is as necessary to the jurist as anatomy to the painter.

The Digests

When a plan has been selected, digests of the common law and of the statutes should be simultaneously commenced.

of Cases;

(1.) To digest the common law will be a difficult and a delicate task. The Reported Cases, and the writings of a few of the sages of the law, must be classified in accordance with the plan; and abstracts of them, or extracts from them, or references to them, must be placed under the appropriate titles: some cases must be chosen to support universals, others to support particulars.

The large class of cases which has been decided upon the wording of statutes should be digested separately; with a view to the result being afterwards interwoven with the Statute-Digest, either by way of proviso or of illustration —*i. e.*, either by insertion into the statute of words which have been decided to be therein implicitly contained, or by mere reference to the case as an illustration of the application of the statute.

A great difficulty will beset the Case-Digest from which the Statute-Digest will fortunately be free; for, while the existence of a statute is an easily ascertained matter of fact, the authority of a case is frequently a matter of opinion. It is however submitted that it would be better, at any rate in the earlier editions of the Digest, where two cases of equal authority are in contradiction, to print them both in juxtaposition, rather than to wait till one or the other has been sanctioned, either by the ordinary progress of

litigation, or by the decision of high legal functionaries, to whom the duty of determining such questions might be assigned. The mode of working out a Case-Digest will, however, in its details, best be ascertained by experiment.

(2.) A Digest of the Statutes may be far more easily and rapidly accomplished. Preparation for it has already been made by the registers of repealed Acts, which have been recently constructed with great care under the direction of government, and by the nearly completed series of "Expurgation Acts," which have cleared the statute book of a vast amount of obsolete matter. When the plan of the Digest shall have been once clearly and minutely drawn out, the task of fitting the statutes and parts of statutes into their proper places will be comparatively easy. The work would be, however, of very considerable magnitude, were it necessary or desirable to include in the Digest the whole of the statutes now in force. But this is by no means the case. There are thousands of statutes which have no claim whatever to be embodied in a Digest of English law; and would be as out of place there as a charter of incorporation, or a patent of nobility. In such a Digest, of course, none of the avowedly "Local and Personal," or "Private" Acts would be included; and even of the so-called "Public-General" Statutes the large majority would be rejected as unsuitable. of Statutes;

The "Public-General" Statutes may be divided into five groups, which we may call:—(1) The Non-English, comprising Scotch, Irish, Indian and Colonial laws. (2) The local and personal, really though not nominally such. (3) Annual enactments by which the machine of government is carried on. (4) Legislative warrants, which are merely cheques drawn by the nation on its

bankers, or licences to override the law for a special purpose. (5) Laws which are at once general and applicable to England. The last group alone is proper material for a Digest, and forms, probably, not more than a third of the total bulk of the so-called "Public-General" Statutes.

The Statute-Digest might well be published within a year or two, and should then be declared to supersede and repeal all the enactments out of which it had been constructed. All other statutes would retain their validity, and be cited in the usual way.

Consolidation

Both Digests should, as soon as practicable, be consolidated.

of Case-Digests;

(1.) The Common-Law Digest cannot, as before explained, be subjected to this process till, by an intermediate process, the cases and treatises have been reduced to axiomatic rules. And this must occupy many years; unless indeed the work is distributed among many labourers, working simultaneously under one management.

of Statute-Digests.

(2.) The Statute-Digest might easily be consolidated throughout within two years from its completion. And such Statutes as, upon any conceivable arrangement of the Digest, must inevitably be arranged in a book, chapter, or title (as the case may be), by themselves, might be put in hand for consolidation forthwith, without waiting for the publication of the Digest. The law of Divorce, for instance, upon which an Act has been passed almost every year since the first Divorce Act of 1857, might be at once consolidated in two parts; of which the first should contain the substantive law, defining the right to Divorce, &c.; while the second should be devoted

Consolidation may be, to some extent, commenced at once.

to an orderly exposition of the procedure (*f*). The Acts regulating Common-Law Procedure, some hundreds in number, are also peculiarly suited for immediate consolidation. The subject should be arranged in three parts; to be called respectively "Ante-Judicial," "Judicial," and "Post-Judicial;" each subdivided into titles, in which the order of the steps in an action should be closely followed, *e. g.*, the first title of Part I. would be "Notice of Action," and the last "Notice of Trial (*g*)."

Codification.

Each Digest, as soon as it is throughout consolidated, will have become a Code. In neither will the constituent laws be any longer distinguishable; and both having been from the first arranged upon an identical method, they may then be with ease woven into a single Code, in which the distinction between Common Law and Statute will have ceased to exist.

The final Code.

Law and Equity.

No mention has hitherto been made of a great difficulty which stands in our way, but which was not present to the Roman legislators. With them the writings of the jurists had absorbed and superseded the "edict;" but with us the chasm between Law and Equity is as wide as ever. It will therefore be necessary, under many titles, to have two sets of rules, exhibiting the different views of the law which prevail on the opposite sides of Westminster Hall. The mere juxtaposition of these different views must of itself promote their assimilation, and the ultimate identification of Law and Equity (*h*).

(*f*) The Procedure in a suit should be treated chronologically, as in the Rules and Orders recently issued by the Judge-Ordinary.

(*g*) The present writer made considerable progress in such an arrangement of the Statutes bearing on Common Law Procedure; but found that the work would not be worth doing unless with a view to its receiving the authority of the Legislature.

(*h*) The juxtaposition of the Common Law rule and its equitable exceptions, would frequently show that what is supposed to be the rule has

Objections to Codes,

not flexible,

not comprehensive.

It is often asserted that a code must limit the flexibility of the common law, and that it cannot provide for all possible contingencies. To answer these objections fully would be beside our present purpose; it must suffice to remark in the first place that before case-law can be used as a guide, a general proposition has to be elicited from the case, and if this can be done in the hurry of litigation, it may also be done by the deliberate action of a Royal commission. The general proposition is, and ought to be, inflexible when stated in a Code. It is, however, just as inflexible when it has been deduced from a case by a judge. In the second place—a code is not intended to provide specifically for contingencies which have not arisen, nor does it prevent either new legislation or the growth of new case-law. What it professes to do, and what it may effectually accomplish, is to afford a "terminus a quo," a point from which all legal arguments must start, and behind which they are prohibited from wandering; while it maps out the whole field of legal ideas, so that any new law will at once find its proper place amongst kindred topics.

The Revision of the Code.

And this brings us to the consideration of the manner in which a Code, or a Digest, is to be preserved from becoming out of date, or obscured by too thick an overgrowth of later legislation.

This can only be accomplished by the republication of the Code from time to time—say at intervals of ten years; each new edition superseding and repealing the preceding one, and embodying the results of the ten years' legislation and litigation. Such a periodical revision could be carried on only by the agency of a permanent Law-Council, or Department of Justice. Its duties would be to keep a watch upon, sift and classify the results of reported cases; and also to see that all bills, affecting those portions of the law which were treated of in the Code, should be drawn

A permanent Law-Council.

really become the exception. The rule, "that a chose in action is not assignable," may serve as an instance.

with special reference to the particular book, chapter, and title, designed to be affected. It would see that all such bills were drawn according to a regular formula, such as the following:—"Be it enacted, that Book I. chapter xxx. "tit. x. sect. 13 be repealed," or "Be it enacted, that the "following words shall be added at the end, and shall form "part of sect. 13: viz., &c. &c." Supplementary Acts, or "Novels," drawn in this way, would, during each decennial period, cause the profession very little expense or trouble, and would of course be easily noted up on the margin of the Code. The other classes of statutes would only be purchased by the lawyer when he had special need of them, but he would in general trouble himself as little about them as he now does about the hundreds of "Local and Personal Acts" which are passed each session" (*i*).

The Statute-Digest should be published speedily.

For the later stages of the progress towards perfection which we have attempted to describe, we shall doubtless have many years to wait; but there is no reason why the earlier stages should not be very speedily attained.

The Statute-Digest, at least, might almost immediately be placed in the hands of the profession: and it is the more desirable that its completion should be hurried, because all new legislation upon subjects which come within its scope, might then begin to be conducted in the scientific manner which we have just been advocating.

The unrepealed, general, English Statutes should be published at once.

It is however probable that a delay of some years may intervene before a scheme of legal classification is selected, and a Statute-Digest, constructed in accordance with it, actually makes its appearance. We may therefore, perhaps, be permitted to suggest that the cause of law-reform would be much aided if the Government were at once to direct the publication, in a merely chronological order, of all statutes of a really general nature, which have their operation in England, and have not been repealed.

(*i*) Special collections of the Scotch, Irish, Indian and Colonial Acts should undoubtedly be published by authority for the use of those whom they may concern: but this is beside our present inquiry, which is confined to the Laws of *England*.

A competent editor could easily select the statutes, and parts of statutes, which possess these three characteristics. They would form the material of the future Digest; for which, with the aid of a good index, they would be no mean temporary substitute.

The English lawyer would then possess an authoritative edition of every syllable of living statute law with which he has any habitual concern; and that in the compass of certainly not more than half-a-dozen volumes.

Recapitulation.

Briefly to recapitulate. The defects of the law at the present day are chiefly defects of form; the consideration of which ought as far as possible to be kept distinct from the discussion of defects of matter. Our statute-law and our common-law are so distinct that their reformation must be undertaken separately, although upon an identical plan. The stages of progress must be, in each case, digesting—consolidation—codification.

At some remote period we may hope to see the two codes blended into one. The authority of newly decided cases will be, doubtless, invoked to explain the meaning of the code, and these can be reduced within moderate dimensions only by being periodically revised and incorporated into new editions of the code. All legislative changes in that portion of the statute law which will be embodied in the code, *i. e.*, the general law of England, must be by bills drawn with special reference to their effect upon the code; and all alterations so effected must form part of the code itself at its next periodical republication. To carry out the proposed reforms, and to superintend the future working of the system, a permanent body must be created.

We may add, that the president of this body should be some high legal dignitary, and that his subordinates should be logicians as well as lawyers.

II.

Codification.

(*From the Edinburgh Review, No.* 258, *for October*, 1867.)

CODIFICATION (*a*).

It is now just half a century since attention was called in these pages to certain proposals which had been put forth by perhaps the greatest theoretical jurist who has ever lived (*b*). Mr. Bentham, despairing of encouragement from the government of his own country, had offered his services as legislator to the United States of America, and to the Emperor of Russia. By neither were his offers accepted, but from both he obtained a respectful hearing. England in those days was indeed beginning to bestir herself towards legal reforms, but her first steps were not in the path which had been most carefully explored by the philosophic jurist. The object at which Bentham chiefly aimed was the re-expression and re-arrangement of the law according to a scientific method. A more pressing necessity for English statesmen was to alter the law itself; to adapt to the ideas and wants of modern civilisation a system which had grown together in the comparative barbarism of the feudal ages. We had to get rid of a series of penal enactments, the indiscriminate severity of which defeated its own object, while it rendered our name a byeword throughout Europe; we had to sweep away some of the more obtrusive absurdities which beset all dealings with landed property; and we had to emancipate our procedure from a network of scholastic subtleties, which seemed woven expressly to prevent causes from being tried upon their real merits.

(*a*) *Edinburgh Review*, No. 258, October, 1869. 1. *Codex Theodosianus.* Instruxit Gustavus Hänel. Bonnæ, 1843. 2. *Civil Code of Lower Canada.* Ottawa, 1866. From the Amended Roll deposited in the Office of Clerk of the Legislative Council, as directed by the Act 29 Vict. cap. 41, 1865.

(*b*) *Edinburgh Review*, No. 57, November, 1819.

The Romillys, the Mackintoshes, the Peels, and the Broughams have done their work; our laws, in humanity and in comprehensiveness, are not unworthy of our civilisation; but the task to which Bentham devoted the best powers of his intellect has still to be commenced. The form in which our law is expressed remains just what it was, and is probably worse than that of any body of jurisprudence now extant in Europe or America. It may be as well to state at once what is meant by so sweeping a condemnation. The case is simply this: while almost every other civilised country has arranged its laws upon some sort of connected system, our law is identical with our legal history. The rules regulating, for instance, the relation of landlord and tenant, or of husband and wife, are to be found scattered at irregular intervals over the whole space which separates the days of the Saxon dominion from the present time. The records of our Parliament, stretching from the reign of Henry III. to that of Victoria; the words which from day to day have fallen from the lips of judges in courts of justice during the last six or seven centuries; the published opinions of such sages of the profession as have been, as it were, canonised by an admiring posterity—these are, not the raw material out of which our law has been constructed, but our very law itself; and we have none other. The statutes of the realm fill about fifty volumes; many of them have been repealed, but it is difficult to say which. The reported cases fill about 1,200 volumes; many of them have been overruled, but none of them bear any outward sign of their fallen estate. Statutes and reports alike have accumulated, layer above layer, in a merely chronological order; so that a given legal topic resembles, not the plan of a well-defined field, but rather the vertical section of a geological formation. The most skilful jurisconsult, when asked to exhibit any particular rule of law, can do so only after first laboriously examining all the legal strata in which any traces of it are to be found, and then piecing together from the fragments thus collected what after all he can only present as a probable reconstruction of the required entity.

The Poet Laureate has described, with his usual fineness of

perception and precision of language, the disheartening labours of the law-student who toils—

> "Mastering the lawless science of our law,
> That codeless myriad of precedent,
> That wilderness of single instances,
> Thro' which a few, by wit or fortune led,
> May beat a pathway out to wealth and fame."
>
> (*Aylmer's Field*, p. 73.)

Such disorder and complexity in a body of law can but result in uncertainty, expense and delay to the suitor. The evil, however, does not stop here. While cognate topics are scattered over a thousand different volumes, and totally dissimilar subjects are found in the closest proximity, it is utterly impossible either for the judge to form a clear conception of the principles which he is called upon to expound, or for the legislator to see precisely what the rule is which he desires to repeal or amend. The tardy recognition by the nation of these practical mischiefs has fortunately synchronised with the growth of a small class of theoretical jurists, who have, however, been obliged for some time to contend with the narrowmindedness of the profession and the apathy of the public—to wait till the patient was sufficiently aware of his illness to be ready to welcome the physician. Our object in the following pages will be to promote, if possible, the movement towards scientific legislation, which was initiated by the writings of Mr. Bentham and by the lectures of his distinguished follower, Mr. Austin.

The non-legal world is very far from realising the importance of the cause which we advocate—the cause of the formal as contrasted with the material amendment of the law. The distinction here drawn, although somewhat scholastic in sound, is in reality simple enough. To change the matter of the law is to change the nature of its provisions; to enact, for instance, that persons, instead of being allowed to make a will at the age of eighteen, shall not be capable of such an act till they attain twenty-one. To change the form of the law is to alter the mode of its expression; for instance, to gather into one chapter the various enactments upon the subject of forgery which had before been scattered through the statute-book. The formal

amendment of the law is indeed one of the most useful services which can be rendered to the human race, and one which never fails of an ample reward of fame. Justinian is far better known for his legal reforms than for the success of his arms; and Napoleon was doubtlessly truly prescient of the final estimate which will be made of his greatness, when he said, "I shall "go down to posterity with my Code in my hand."

We propose to show, by a slight historical sketch, that England stands alone among civilised nations in never having methodised her law; we shall then mention briefly the preliminary efforts which she has of late years made towards improvement; and shall offer in conclusion some suggestions as to the object which our legal reformers should propose to themselves, and the means by which that object is most likely to be attained.

I. In order to keep our historical survey within moderate bounds, it will be necessary to confine it to the legislation of the European races. We must also leave unconsidered those very ancient codes which seem to have made their appearance at an early stage in the history of almost every nation. The Draconian tablets and the Twelve Tables at Rome mark an epoch when reading and writing have become common, when law has become so far fixed that it may be exhibited in a permanent form, and when the people are so far enlightened as to care to have their laws generally accessible. Our attention must be confined to a very different species of legal reforms, which appeared everywhere at a far more advanced stage of history, and which had for their object not so much to fix the law, or to take it out of the hands of a particular caste, as to render intelligible by arrangement upon scientific principles a mass of enactments, the growth of many centuries of ingenious litigation.

The legal reforms of the Roman emperors are not only the earliest instance, within the scope of our present inquiry, of the concurrence of an unmanageably bulky body of law with a school of jurists competent to reduce it into some sort of order, but they may also afford many hints for the similar work which has now to be undertaken in England. The sources of

law were as numerous with the Romans as with ourselves. Cicero enumerates—"statutes, decrees of the senate, decided "cases, the authority of the sages of the law, the edicts of "magistrates, custom, and equity" (*c*), to which in later times were added the Rescripts and Constitutions of the Emperors. No wonder that the "immensus aliarum super alias acervatarum "legum cumulus," of which Livy speaks (*d*), became some centuries later "a load for many camels" (*e*). Cæsar seems to have intended to reform this confusion (*f*); and much was gained when, under Hadrian, the prætorian edicts were consolidated into the "edictum perpetuum." But the first decided step in the right direction was the publication of the Gregorian and Hermogenian codes in the time of Constantine (*g*). These compilations, in which the imperial rescripts, from Hadrian to Diocletian, were conveniently digested under appropriate titles, though apparently the work of private individuals, soon acquired a very high authority. They were closely analogous to those arrangements of the statutes which have been from time to time attempted in England, by Tyrwhit and Tyndale, Chitty, and others. For the imperial constitutions bore an exact analogy to our Acts of Parliament, while the writings of the great jurists corresponded accurately enough to what we call common law; and it was through these two sources alone that the other sources of law enumerated by Cicero were under the Empire practically known or operative. The constitutions, or as we should say the statutes, had become very numerous, and had been of course issued from time to time, just as the occasion prompted, upon no system whatever. But the enactments which these contained were simple and few when compared with the vast labyrinth of principles and illustrations

(*c*) Top. c. v.

(*d*) iii. c. 34.

(*e*) Eunap. in vita Œdesii, p. 72.

(*f*) "Jus civile ad certum modum redigere, atque ex immensa diffusaque "legum copia, optima quæque et necessaria in paucissimos conferre libros." (Sueton. *J. Cæsar*, c. 44.)

(*g*) These codes, which exist only in fragments, are best edited by Hänel, in the "Corpus Juris Antejustinianeum" of Böcking (Bonnæ, 1837—41); where he shows their probable arrangement.

which derived its authority from the independent and often conflicting writings of generation after generation of great jurists. Statute law and common law were equally in need of re-arrangement, but the Romans wisely attacked the easier task first; and thus it was that their first step towards legal reform was the introduction into the Constitutions, by Hermogenianus and Gregorianus, of a scientific method in place of a merely chronological sequence.

And the next step was of a similar character. In the year 429 the Emperor Theodosius II., with the concurrence of Valentinian III., undertook to continue the work of Gregorianus and Hermogenianus, by editing the constitutions which had been promulgated since the date of their publications. He therefore issued a commission to Antiochus, "ex-quæstor and præfect," with some others, empowering them to arrange and abbreviate the hitherto unarranged constitutions. Nothing having been in the meantime accomplished, another commission was issued in 435, to the same Antiochus and fifteen others, with larger powers than before: "Demendi supervacanea, et "adjiciendi necessaria, et mutandi ambigua, et emendandi "incongrua" (*h*).

At length, in 438, Theodosius was able to promulgate his new code, and to decree that after the first of January in the following year, no imperial constitution should be quoted except from the three recognised compilations. The three codes were almost simultaneously adopted in the Western Empire, and arrangements were made by which such constitutions as should be subsequently promulgated by either emperor (*novellæ*) should be forwarded to the other for his acceptance.

The preamble of the constitution by which the code was enacted, though expressed in a viciously florid style, gives a clear idea of the state of things which the Emperor wished to remedy:—

"I have," he says, "often wondered, that considering the great "prizes which are held out for the encouragement of arts and learn-"ing, the instances are so few and far between of a full and ripe

(*h*) These commissions are preserved in the codex.

" acquaintance with the civil law; and that, although so many faces
" are weary and wan with study, it is rare to find anyone who is
" solidly and thoroughly educated. But this state of things will
" cease to be a difficulty, when one reflects upon the vast abundance
" of books, the variety of actions, and the difficulty of the cases;
" and, lastly, the mass of Imperial Constitutions, which has hidden
" the knowledge of itself from the human mind under a mountain of
" thick blackness and obscurity" (*i*).

He says that he has preserved the names of the emperors by whom each constitution was originally promulgated, " manet " igitur manebitque perpetuo gloria conditorum, nec in nos- " trum titulum demigravit nisi lux sola brevitatis."

The code thus published contains constitutions varying in date from 312 to 438 A. D., arranged in sixteen books. It was augmented by various novels; and, though involved at first in the overthrow of the Western Empire, and, upon the re-conquest of Italy by Narses, superseded by the reforms of Justinian, long continued to exercise a very powerful influence over the legislation of the barbarians. It may be as well at once to observe that neither this code nor any of the Roman legal compilations (except to a certain extent the Institutes) possess that character of logical distribution which is essential to a "code," in the modern sense of the term, and in the sense in which we shall have occasion hereafter to define it. The Roman codes were in fact merely what we should call "Digests;" and the method adopted both in the so-called codes and in the digest is almost identical. No logical distribution of the whole field of law according to the fundamental conceptions of jurisprudence was attempted in any of these works, but the various legal rules were gathered into certain large groups, and these groups were arranged one after another in an order which, though little more than arbitrary at first, became habitual, and was not only adhered to more or less from the time of Theodosius to that of Leo, but exercised a marked influence over the legal compilations of the middle ages. This order may be said to be roughly as

(*i*) This Constitution is printed as the first novel. See Cod. Theod. by Hänel.

follows:—First, the law and judges are discussed, next contracts and successions, then the administration and the revenue, then local government, criminal law, and the Church (*k*).

The other great source of law was not entirely neglected by Theodosius. In 429, in order to put some limit upon the citation of authorities, binding and final weight had been given to the opinion of the five greatest jurists, and of certain others whom these had honoured by frequent quotation; and Theodosius in his first commission, already mentioned, intimates an intention, which was however never carried into effect, of dealing with the writings of the jurists after a fashion much more ambitious even than that subsequently adopted by Justinian. He in fact projected an unification of statute law with common law in one great work, which would thenceforth form the complete rule of life (*l*).

A century after the reform of Theodosius it was felt that a similar work was again necessary. Many new constitutions had been issued in the meantime, and many of them had effected important changes in the law. The writings of the jurists, moreover, still remained unarranged. Justinian therefore, in the year 528, commissioned Leontius, ex-quæstor of the palace, Tribonianus, and eight others, to arrange all the imperial constitutions, as well those included in the Gregorian, Hermogenian and Theodosian codes, as those of later date, in a new code to be called by his own name.

He instructed the commissioners:—

"To compile definite and shortly-expressed laws from the afore-
"said three codes and the later constitutions, cutting off all prefatory
"matter, which is useless as adding nothing to the laws themselves,

(*k*) The Theodosian Code is arranged as follows:—Book 1 is devoted to judges, courts, &c.; 2, procedure; 3, 4, 5, contracts, wills and successions; 6, 7, 8, the administration; 9, criminal law; 10, 11, revenue; 12–15, municipal corporations, public works, &c.; 16, the Church. In the later codes ecclesiastical law occupies the post of honour. Legal method appears to us to be a subject which has never as yet received sufficient attention, and we propose, therefore, to append in the notes outlines of the arrangement of each of the more important codes mentioned in the text.

(*l*) This meaning is not generally given to his certainly obscure expressions, but it is submitted that they will bear no other interpretation.

" all repetitions and all contradictory passages, unless they are ex-
" plained by another division of law, and all that is obsolete; to
" arrange them under appropriate titles, adding to and curtailing,
" and even changing their words, as convenience may require; col-
" lecting into one enactment what is scattered through several con-
" stitutions, and making the meaning clearer: yet so that the
" chronological sequence of those constitutions shall be evident, not
" only by references to dates and consulships, but also from their
" arrangement itself; the earlier constitutions being placed first, and
" afterwards the later ones."

The Code was completed, and received the force of law in the following year, but was shortly afterwards suppressed, and in 534 re-published in the form in which we now possess it. No constitution might thenceforth be cited from any other source. Except that it gives the first place to ecclesiastical law, its order is not materially different from that followed in the Code of Theodosius (*m*).

In 530 the Emperor confided to Tribonian and such colleagues as he might himself select, a far heavier task. He begins by saying that he had observed: " omnem legum tra-
" mitem, qui ab urbe Roma condita et Romuleis descendit tem-
" poribus, ita esse confusum ut in infinitum extendatur." He mentions that he had remedied this confusion in the case of the constitutions, but has now a higher ambition:—

" To collect and emend the whole of the Roman jurisprudence, and
" to exhibit, compressed into a single code, the scattered volumes of
" innumerable writers, which no one else has ventured to hope or to
" wish for. The thing appeared indeed to us to be very difficult—or
" rather to be impossible—but lifting up our hands to heaven, and
" imploring the aid of the Eternal, we have accepted this responsi-
" bility also. We command you therefore to read the legal treatises
" of the old lawyers, to whom the most sacred emperors gave authority
" to compile and interpret the laws, and sift them, and so to collect
" your material out of all these; omitting, as far as possible, both
" repetitions and contradictions."

(*m*) It contains 12 books: of which 1, treats of the church and judges; 2, of advocates, proctors and various actions; 3, of other actions and servitudes; 4, of bailments; 5, of marriage and guardianship; 6, of slaves, successions and testaments; 7, of prescription, judgment and appeals; 8, of adoption and donations; 9, of crimes; 10, of the treasury and public services; 11, of ships and public works; 12, of dignities and professions.

The matter was to be arranged in fifty books, "according to "the order of the new code and of the perpetual edict," and the books were to be grouped into seven parts (*n*).

The Digest or Pandects, the result of these instructions, was published in 533, and received the force of law. It contains the substance of more than two thousand treatises of the great jurists, and covers nearly the same ground as the first nine books of the Code. Justinian had previously, in 530, caused to be published, for the use of students, the "Institutes," which are arranged upon the model of the "Commentaries" of Gaius, and treat successively of persons, of things and of actions; a distribution of subject which has exercised much influence upon modern jurisprudence (*o*).

Great as were the achievements of Justinian, he fell short of the aspirations of Theodosius, who, as already mentioned, had dreamed of weaving together both statute and common law into one harmonious system. This project was, however, carried out three centuries later by the Emperor Leo the philosopher, whose "Basilica" were a translation into Greek, and a consolidation, in sixty books, of Justinian's Code and Digest, together with his novels, and those of the later emperors. Leo uses in his preface words which our own statesmen would do well to ponder: "It seemed to our majesty that the dispersed state of the law "was the cause of its difficulty and its want of precise arrange-"ment" (*p*). The Basilica were law of the Eastern Empire

(*n*) Part 1 was to contain the Elements; 2 was to be intitled De judiciis; 3. De rebus; 4. De hypotheca, usuris, sponsalibus, tutelis, and other matters not grouped together in the Edict; 5. De testamentis; 6. Successions, obligations, &c.; 7. Stipulations, delicts, crimes, appeals, municipalities and definitions of terms. These seven parts corresponded to the main divisions usual in commentaries on the Edict.

(*o*) This arrangement seems to have prevailed in the Edict. Hermogenianus (Juris Epitom. lib. i.) says, "Cum igitur hominum causa omne jus constitutum "sit, primo de personarum statu, ac post de ceteris, ordinem Edicti perpetui "secuti dicemus." (Apud Dig. i. Tit. v.)

(*p*) *ἡ τῶν νόμων ἀπομεμερισμένη οὖσα κατάστασις ἐλλείπειν ἔδοξε τῇ βασιλείᾳ ἡμῶν, εἴς τε τὸ παρελεῖν τῆς τῶν νόμων δυσχερείας, καὶ εἰς τὸ αὐτὴν τάξεως τυχεῖν ἀκριβοῦς· τοιγαροῦν τὰς πάντας τῶν νόμων πραγματείας ἡμεῖς σωματοποιησάμενοι ἐν τέυχεσιν ἓξ συνεφαλαιώσαμεν.*

till the fall of Constantinople; and, upon the recent establishment of the independence of Greece, were declared to be law in the new kingdom (*q*).

Even the barbarians, who in the fifth century overran the Roman Empire, saw the importance of employing their newly-acquired familiarity with the art of writing in the compilation of bodies of law. This was indeed the more necessary on account of the personal, rather than territorial, obligation which was then almost everywhere the characteristic of legal systems. Romans, Goths, and Lombards, though all living under the same sovereign, were amenable only to the Roman, Gothic or Lombard law respectively. The conquerors, therefore, on the one hand, caused collections of Roman law to be published for the benefit of the conquered race, while, on the other, they committed to writing for the first time the rules which had guided themselves when as yet they were on the further side of the Rhine and the Danube. As these attempts preceded the reforms of Justinian, the compilations of Roman law were founded on the Code of Theodosius. In the earlier of them little or no order is discernible. The edict of Theodoric the Ostrogoth (A.D. 500) contains 154 unconnected titles, entirely derived from Roman sources. The "Breviarium" of Alaric the Visigoth was published in 506, with the following heading:—"In hoc corpore continentur leges sive species juris de Theo-"dosiano et diversis legibus electæ, et sicut præceptum est "explanatæ" (*r*). It contains abridgments of the Theodosian Code, of the novels and of several approved treatises. It was superseded about 650 by the "Lex Romana Visigothorum," which is arranged far more scientifically than any of its prede-

(*q*) The general arrangement of the work is as follows:—Book 1. The Catholic faith; 2. Laws; 3. Bishops; 4 and 5. Monasteries; 6. Magistrates; 7—10. Courts and procedure; 11. Pacts; 12. Partnerships; 14—26. Bailments, suretyships, &c.; 27. Disputed ownership; 28—30. Marriage; 31—33. Children; 34. Postliminium; 35—45. Testaments, guardians and successions; 46. Status; 47. Donations; 48. Manumissions; 49. Patrons; 50. Dominion and possession; 51. Exceptions and prescription; 52. Obligations and actions; 53. Ships; 54. Municipalities; 55. Agriculture; 56. Revenue; 57. Army; 58. Servitudes; 59. Funerals; 60. Criminal law.

(*r*) See these codes in Canciani, "Leges barbarorum."

cessors (*s*). The Burgundians, who shortly before the Frankish conquest, i. e. about 520, had published a law for their own race, published a few years later a compilation for the use of their Roman subjects, which is generally known as the "Papiani Responsa." It is quite unsystematic.

A few of the more important collections of pure barbarian law will next claim our attention. About the year 638, Rothar, king of the Lombards, published his edict, of which he says: "Leges patrum nostrorum quæ scriptæ non erant condimus" (*t*). The Lombard was the most generally received of the barbarian systems in Italy, and was even translated into Greek for the use of the southern provinces (*u*).

The characteristic of the Teutonic group of codes is that they are almost exclusively occupied with the subject of pecuniary composition for offences. The salic law of Clovis contains eighty titles all devoted to this topic; and the "lex salica "reformata" of 798 is of the same character, as are the Ripuarian and Allemannic compilations; that of the Bavarians is considerably more artificial (*x*). The laws of our own Ethelbert closely resemble these continental codes. Its eighty-nine titles are all devoted to composition, and bear no trace of Roman influence. After the laws of particular Teutonic peoples come

(*s*) The subjects of its several books are as follows:—I. De instrumentis legalibus; II. De negotiis causarum; III. De origine conjugali; IV. De origine naturali; V. De transactionibus; VI. De sceleribus et tormentis; VII. De furtis et fallaciis; VIII. De inlatis violentiis et damnis; IX. De fugitivis et refugientibus; X. De divisionibus et temporibus atque limitibus; XI. De ægrotis medicis mortuis et transmarinis negotiis; XII. De removendis pressuris et omnium hæreticorum sectis extinctis. It was a territorial law, and it altogether proscribed a reference to the Roman law—"nolumus sive Romanis legibus sive alienis amplius vexari." (ii. 1.)

(*t*) Titles 1—152 of this Edict treat of crimes; 153—229 of successions, gifts and marriage; 230 treats of sales; 240 of offences against landmarks, of coining, theft and damage; total number of titles 390. In the twelfth century the laws of Rothar and his four successors were digested into the "Lombarda."

(*u*) The translation was published by Zachariæ, Heidelberg, 1835.

(*x*) It is thus arranged:—Title I. De ecclesiasticis rebus; II. De ducibus; III. and IV. De liberis (i. e. the compositions for injuries to free men); V. De servis; VI. De nuptiis; VII. De uxoribus; VIII. De furto; IX. De incendio; X. De violentia; XI. De terminis ruptis; XII. De pignoribus; XIII. De vitiatis animalibus; XIV. De commodatis et commendatis; XV. De venditionibus; XVI. De testibus; XVII. De campionibus; XVIII. De mortuis; XIX. De canibus; XX. De avibus; XXI. De pomariis et nemoribus et apibus.

the "capitularies" of the Frankish kings, affecting all their subjects alike. These were first digested in 1327 by Ansegisus. His order is inartificial enough. The first book of his "Capitularium regis Francorum" contains the ecclesiastical ordinances of Charlemagne, the second those of Chlodovic, the third Charlemagne's mundane ordinances, and the fourth the mundane ordinances of Chlodovic. Benedictus Levita, in 1345, added to the work three more books. The early legislation of the Teutonic races was however soon superseded by, on the one hand, a revived study of Roman law—the natural consequence of advancing civilization; and, on the other hand, the growth of feudal customs.

In Italy, the old jurisprudence, after a long competition with various barbarian systems (*y*), became the common law of the country; although by the time of Petrarch such inroads had been made upon it by the "Statuta" of the various cities, that he says "Senescunt pæne jam Romanæ leges."

The Roman law also regained its sway in France south of the Loire, the "pays du droit écrit," and continued paramount there till the Revolution of 1789; but France north of the Loire, the "pays coutumier," was quite overgrown by local customs.

The Visigothic law prevailed generally in the kingdoms of the Spanish peninsula till the thirteenth century, while Germany long divided its allegiance between local customs and Roman ideas imported by the emperors from Italy.

Of the various legal compilations produced by this state of things a cursory notice must suffice. The Italian municipalities very frequently revised their "Statuta." This was done, for instance, by Milan in 1218, by Verona in 1228, by Florence in 1285, 1353, 1408 and 1415. The most famous revision of the Venetian laws was that of the Doge Tiepolo in 1242 (*z*).

(*y*) Agobard in a well-known passage says: "Plerumque contingit ut simul "eant aut sedeant quinque homines, et nullus eorum communem legem cum "altero habeat." (T. vi. p. 356.)

Sclopis ("Législation Italienne," i. p. 57) enumerates five distinct systems which were simultaneously in force in Italy.

(*z*) Many of these collections have been recently edited by Italian antiquarians. Sclopis, ii. p. 135, gives an abstract of the Florentine revision of 1415, and p. 140, of that of the Doge Tiepolo.

The earliest *coutumiers* of France were compiled in the thirteenth century. They were succeeded by the *coutumes*, the earliest of which is that of Ponthieu, 1495. At a later period came the reformation of the *coutumes*, which commenced in 1580, and produced revised editions of the *coutumes* of Paris, Orleans, Amiens and other places.

The national jurisprudence of Germany gave rise also to bodies of customary law, such as the "Sachsenspiegel," written in the thirteenth century by Eike von Repgow, and, later, the "Schwabenspiegel," the "Kaiserrecht" and the "Deutschen-spiegel." The customs of certain great towns were followed by neighbouring cities; and the customs of various provinces were consolidated into a "Landrecht," such as the "Oestreichisches Landrecht" of the thirteenth century (*a*). The introduction of Roman law on a large scale into Germany led in the sixteenth century to general revision of the national customaries (*b*).

In Spain, the period of the collection of local customs (*fueros*), e. g. the "fuero de Leon," 1020, was followed by attempts at legislation for the whole country. In 1258, Alphonso X. of Castile promulgated the "Siete Partidas," which however were not ratified by the Cortes till 1348. Partida I. relates almost exclusively to ecclesiastical matters; II. to the king and great officials; III. to judicial procedure; IV. and V. to contracts, &c.; VI. to testaments and successions; VII. to crimes. In 1567, Philip II. published a Digest of laws, each entitled according to the year and reign of its proclamation, which is known as the "Recopilacion." This was revised and republished in 1776 and in 1804 (*c*).

The local statutes of Portugal were collected in the fifteenth century in the "Codex Alphonsinus," and, during the union of the country with Spain, in the "Ordinatio Philippina."

(*a*) The Landrecht of Bavaria, 1346, the "leges Upstalbomicæ," 1326, and the "Charte de Hainault," 1200, were of the same character.

(*b*) To this movement was due the publication of the Bavarian customs in 1578, of those of Frankfort in 1578, 1611, &c.

(*c*) It contains 12 books, arranged as follows:— I. The Church; II. Ecclesiastical tribunals; III. The king; IV. Royal jurisdiction; V. Ministers; VI. Ranks and taxation; VII. Municipal government; VIII. Arts and sciences; IX. Commerce and mines; X. Contracts, testaments and successions; XI. Civil tribunals; XII. Delicts and criminal tribunals.

The Slavic customs of Russia were compiled under the title of "Pravada" in the twelfth century. In 1231, Frederic II. published in three books the "Constitutions of the Kingdom of Sicily;" and in 1395, Eleonore, Judge of Arborea in Sardinia, promulgated the famous "Carta de Logu." In 1430, Amadeus VIII. of Savoy edited his five books of decrees (*d*).

As the stream of European legislation widens, it becomes impossible within moderate limits to attempt a complete survey of its course; the general character of which may however be suggested by a few features which must serve as specimens of the rest. In 1532, the Emperor Charles V. published the "Carolina," which is an ordinance embodying the criminal law, as established by custom or derived from the Roman jurisprudence. It contains 219 articles. In 1610 was published "Das "des Hertzogthums Würtemberg erneuerte gemeine Land-"recht." The laws of Norway were codified by Magnus Lagabæter, who died 1280, and republished in 1604 by Christian IV. Christian V. of Denmark, in 1683, promulgated a code in six books (*e*); which, when Mr. Laing visited Norway, was to be found, comprised in one pocket volume, in every peasant's house in the country (*f*). In 1608, Charles IX. of Sweden published a code, which had been preceded in 1442 by the Code of King Christopher (*g*).

Up to this point Europe had added nothing to the ideas of legal method which it had inherited from the Romans. The Romans had introduced three great improvements into formal jurisprudence: first, they had substituted, for a multitude of heterogeneous sources of law, the sole authority of certain

(*d*) For the order of its arrangement see Sclopis, ii. p. 192.

(*e*) Lib. I. De re forensi; II. De re ecclesiastica; III. De re civili; IV. De re navali; V. De re propria atque aliena; VI. De re sontica.

(*f*) Laing, "Residence in Norway," edit. 1851, p. 143.

(*g*) The arrangement of the Code of Charles IX. is as follows:—Title 1. De rege; 2. De conjugio; 3. De jure hereditario; 4. De jure agrario; 5. De jure ædificandi; 6. De jure mercandi; 7. De judicio territoriali; 8. De turbatione pacis; 9. De gravioribus criminibus; 10. De homicidio voluntario; 11. De homicidio casuali; 12. De vulneratione voluntaria; 13. De vulneratione casuali; 14. De furto. (See the Latin version, Holmiæ, 1672.) In 1618 Gustavus Adolphus published a very similar code of the "leges civitatum," with additional titles "de alea" and "de jure ecclesiastico."

definite volumes. Secondly, they had gathered together the various enactments which had been promulgated at different times upon any given legal topic, and had grouped them under an appropriate title. Thirdly, they had arranged the titles or groups thus formed, one after another, in a regular, though unscientific, order. The Digests, as we should call them, which were thus produced, were very rudely imitated by the barbarians, and with better success by the legislators of the middle ages.

Two further improvements were, however, necessary to carry the process of codification to perfection; and these were, first, to consolidate the arbitrarily arranged laws contained in each ultimate subdivision of a digest into one new and self-consistent enactment; and, secondly, to subordinate the various divisions of the digest to one another according to a scientific method. It was reserved for the eighteenth century to make these improvements. Then it was that legislation began to be guided by really philosophical principles. Then appeared a series of jurists by whose writings a flood of light was thrown upon the relations which law bears to history on the one side, and to ethics on the other; while experiments were made in the practical application of scientific views destined to lead up to the solid successes of the century following.

The movement began in Italy. In 1729, Victor Amadeus II. of Savoy reduced into six orderly books the Constitutions by which, concurrently with the Roman law, the country was governed (*h*). In the time of Charles de Bourbon, the competition of no less than eleven systems of law in the kingdom of Naples led, in 1741, to the appointment of a commission for the purpose of codifying them; which, however, produced no result. The good intentions of Francis of Tuscany (1745) were attended with no better fortune, although his son Leopold succeeded in making great improvements in penal law. In 1771 Francis III. of Modena commenced the publication of the "Code d'Este." The Swedish civil code, which is still in force, appeared in 1734.

(*h*) This was republished by Charles Emanuel in 1770.

The "Code Frédéric" must, however, be regarded as the first fruit of the legislative ideas of the eighteenth century. Where Roman law was accepted as of concurrent authority with the particular law of the country, attempts at codification had hitherto been confined to the latter; the grander conception of the "Code Frédéric" was to supersede the Roman codes as well as the local compilations by one well-ordered work which should assimilate whatever was worthy of imitation in either system. It was published in German and French in 1751, but did not receive the force of law till 1794. It is drawn up on scientific principles, and is thoroughly comprehensive in scope. The evils which it was intended to remedy are set forth in the preface (*i*), viz. 1. The difficulties of the Roman codes; 2. The disputes of the commentators; 3. The contradictions of German and Roman law. Its object is described as being to promulgate a "droit général du pays, qui "comprenne toutes les loix de la société civile: de faire précéder "à chaque matière les principes généraux; d'en déduire les "conséquences qui en découlent nécessairement; et de former "ainsi un système universel, qui puisse être appliqué à tous les "états que prennent la raison pour règle et pour fondement de "leur loix." It follows the Institutes in dividing the subject into the law of persons, of things, and of obligations (*j*). Other German states were also fertile in attempts at codification during the latter half of the century. Maximilian Joseph III. of Bavaria promulgated criminal, judicial and civil codes in 1751, 1753 and 1756 respectively. Maria-Theresa in 1768, and Joseph II. in 1786, issued penal codes for Austria. Maria-

(*i*) See French edition of 1751. The preface, §§ 23, 26, 27, states that no attempt at codification had been made by the Empire, and that the bodies of law compiled by Prussia, the Palatinate and Würtemburg respectively, were none of them systematic, and all allowed a co-ordinate authority to Roman law.

(*j*) The arrangement of the first of the three parts comprised in this code will give some idea of the whole. The first part contains three books: Book I., after discussing the terms "jurisprudence," "law," "right," &c., proceeds to consider the first object of "droit," viz.:—"l'état des personnes," under the three heads of "liberté," "la famille," and "le citoyen;" Book II. is devoted to subjects connected with "l'état de famille," such as "mariage;" and Book III. to subjects connected with citizenship as well as family, such as "tutèle."

Theresa, indeed, authorized the formation of a civil code, which, however, was not produced till 1811. But it was from the French Revolution, and the ideas disseminated by that event, that legal reforms derived the impetus which has carried them so much further in the present century than at any preceding epoch.

Commissioners were appointed in 1800 by Bonaparte to consider the question of a reconstruction of the law of France, and their labours resulted in the production of the famous five codes. The "Code Civil" became law in 1804. Like the "Code Frédéric" its arrangement is derived from that of Justinian's Institutes. It was followed by the codes of civil procedure, of commerce, of penal procedure, and lastly in 1810 by the penal code. The successes of the French arms, of which the legislative have in many instances survived the military and dynastic consequences, diffused these codes throughout Europe. The "Code Pénal," for instance, was introduced into Italy, Sicily, Holland, Belgium, the Rhine Provinces, Poland, and Switzerland; and where it was once planted it took firm root. In most of the Latin races of Europe either the French penal code, or some close imitation of it, is law at the present day. And the civil code has had almost as many imitators.

Ever since the fall of the first French Empire, the Latin races have been engaged in voluntarily assimilating their legal systems to that which was for a time imposed upon them by force. The Two Sicilies, in 1819; the Netherlands, in 1822 and 1837; Haïti, in 1826; Sardinia, in 1837; the Ionian Islands, in 1841; and the Swiss Cantons from 1819 to 1855, produced civil codes closely resembling the French. And Bolivia, alone of the Spanish Settlements in South America, did the same in 1843. In Spain the "Commission de Codigos" has drawn up commercial, penal and civil procedure codes, which became law in 1829, 1848 and 1856 respectively, and in 1852 published a project for a civil code, which is still under consideration. Portugal has produced a code of commerce 1833, a procedure code (novissima riforma judicial) 1841, and a penal code, 1852; but no civil code as yet. The latest

specimen of this group of codes is probably the Italian Code of 1865.

While the French codes have thus widely influenced the kindred races of the Continent, Germany has followed a somewhat different method. The criminal code of Bavaria, drawn by the celebrated Feuerbach and promulgated in 1813, has been adopted by Saxe-Weimar, Würtemburg, Oldenburg, St. Gall, Bâle, Zürich, Sweden and Greece. A new penal code for Bavaria was, however, issued in 1862. The Austrian penal code was revised in 1806, 1813 and 1852. In Prussia the penal laws were codified in 1851; in Hanover in 1824; in Hesse-Darmstadt in 1831; and in Baden in 1836. The formation of civil codes has not been so rapid. That commenced for Austria by order of Maria-Theresa was not published till 1811, and only in 1852 was it extended to Hungary. In Bavaria no less than sixty-two different species of civil law was found to be operative in 1811; and the labours of the commission which was then appointed to remedy this state of things have as yet produced no result. Several of the minor states have, however, codified their civil law, and a code of commerce (das allgemeine deutsche Handelsgesetzbuch) has been prepared by the Bund and accepted by most of its members, including Austria and Prussia.

Penal and procedure codes were drawn up for Greece by M. Maürer, and promulgated in 1833, but instalments only of the civil code have appeared, and, pending its completion, the Byzantine laws contained in the six books of Harmenopulus were, by a royal ordinance of 1835, declared to be still in force.

Not the least curious chapter of a History of Codification would be that which should trace the progress of law reform in Russia. The foundation of Russian law at the present time is the compilation which, under the title of "Ulogenie," was promulgated in 1649 by the Czar Alexy Michaelovich. In 1700 Peter the Great organized a commission for the purpose of remodelling the Ulogenie and of incorporating with it the later ukases. But this body, during 130 years of its existence, which was virtually uninterrupted for this long period, produced no tangible result. It was frequently reconstructed, notably by

Catherine II. in 1767, who, after studying Montesquieu, Puffendorf and Beccaria, wrote instructions for the guidance of the commission with her own hand, which were much admired by Frederic II. of Prussia. The Emperor Nicholas placed the distinguished jurist Speranski at the head of the commission, which under his superintendence at length published the "Sobranie Pervoe," containing all the laws from the date of the Ulogenie of 1649 to the accession of Nicholas in 1825, and the "Sobranie Vtoroe," comprising laws promulgated between the latter date and 1832. These works were arranged in chronological order and accompanied by convenient indices. They served as materials for the construction of the "Svod "Zaconow rossuskii imperii," i. e. "Co-ordination of the Laws "of the Russian Empire," which appeared in 1832, and became the exclusive source of law in 1835. The "Svod Zaconow" comprises eight codes, devoted to the following subjects:— 1. The state and Imperial family; 2. Public services; 3. Finance; 4. The classes of persons; 5. Civil law; 6. Administration; 7. Police; 8. Penal law. It contains about 38,000 articles, to each of which is added a reference to the ordinance from which it was taken. It provides for the publication of an annual supplement, arranged according to the order of the codes, to be confided to a permanent commission. By this commission the "Svod Zaconow" was republished in 1843 (*k*).

It was not until the law of the continent of Europe had almost everywhere assumed a scientific shape that the English of the old and new world at length turned their attention to legislative reforms. The English-speaking races not subject to English rule were the first to move in the matter; then an English colony here and there attempted to deal with the question. Surely England herself, the stronghold of the law which is not made but grows, must some day yield to the ideas which have triumphed in every other quarter of the civilized world. It is quite in keeping with the general history of the movement

(*k*) Full information upon Russian codification may be found in "Études his- "toriques sur la législation Russe," par Spyridion Zezas, 1862; and in "Précis de notions historiques," &c., par Speranski, 1833. A Translation into French of the Civil Code was edited by V. Foucher. Paris: 1841.

that the French-speaking state of Louisiana should have been the first on the American continent to accept these ideas. As early as 1820 Mr. Livingstone was commissioned to prepare a penal code for Louisiana, which was followed in 1824 by a civil code. In 1836 the statutes of Massachussets were consolidated under four heads:—1. The government of the state; 2. Property; 3. Courts and civil procedure; 4. Crime and criminal procedure. In 1841 the statutes of Maine were consolidated in twelve titles. In 1853 Maryland appointed commissioners who produced a statute-code, which became law in 1860. It consists of two volumes, superseding statutes which occupied forty volumes, and is arranged alphabetically, from "abatement" to "wildfowl." The state of New York, after several tentative efforts, has at length caused to be compiled one of the best codes of modern times. It embodies both common law and statutes, and occupied three commissioners for eight years, 1857—1865. It is divided into—1. The political code; 2. The civil code; 3. The code of civil procedure; 4. The penal code; 5. The code of penal procedure; and 6. The book of forms. The civil code, following the order of Justinian's Institutes, the Code Frédéric and the Code Napoléon, treats successively of the law of persons, of property and of obligations. A fourth division is a repository of miscellaneous matter. Faults might easily be pointed out in the arrangement of the work (*l*), which is doubtless also somewhat more roughly put together than would be approved of in England, but it will afford much help and encouragement to our own efforts in the same direction.

The Canadian statutes have for some years been consolidated in three groups, viz.: those relating to both provinces, those relating to the upper and those relating to the lower province; and now the whole civil law of Lower Canada has been recently codified, with the exception of the rules affecting the seignioral tenures, in pursuance of the local Act 20 Vict. c. 43.

(*l*) *E.g.* Corporations are treated of in the third chapter of Part III. (concerning moveable property) of Division II.; the law of torts is dismissed in four pages (252—266); and civil actions are said in the procedure code to arise (1) out of obligations; (2) out of injuries.

The task was one of no slight difficulty. The customary law which in France had been swept away by the Revolution and replaced by the Code, was still in force throughout the province; and the ancient French jurisprudence had been complicated by the legislation of the English Government. The whole was, however, accomplished in four years, 1860—1864, by three commissioners. The Code is divided into four books, treating respectively of persons (*m*); of property; of the modes of acquiring ownership, and obligations (*n*); and of commercial law.

A series of codes for British India have also for a long time been in course of publication. A penal code was drawn up by a commission of which Lord Macaulay was a member, and was presented to the governor-general as long ago as 1837, but did not become law till 1860 (Act xlv.) This is doubtless the most scientific piece of legislation in the English language; its definitions are metaphysically precise, and where such language is likely to perplex an ordinary reader illustrations are added for the purpose of explaining it. A code of civil procedure became law in 1859 (Act viii.), and was followed in 1861 (Act xxv.) by a code of penal procedure. The code of substantive civil law is now in progress. The Law Commissioners in India having, in 1840, reported that "There is not in actual "operation, beyond the limits of the capital towns of the three "Presidencies, any *Lex Loci*, any substantive civil law for the "various classes of persons who have not, like the main por-"tions of their population, special laws of their own, which our "judicatures are required to enforce;" a commission in England, of which Sir J. Romilly, Lord Chief Justice Jervis, and others, were members, in their second report, in 1855, arrived at the conclusion that "what India wants is a body of substantive "civil law, in preparing which the law of England should be "used as a basis; but which, once enacted, should itself be the "law of India on the subjects it embraced." They added, "Not only must there however be large exceptions in respect

(*m*) Under which head the law of corporations is very properly included.

(*n*) Under obligations those rights, the violations of which are *délits*, are very inconveniently and meagrely treated.

"of amenability to this body of law, but there are important "subjects of civil law which we think it would not be advisable "that it should embrace." To carry out this recommendation, a commission was issued in 1861 to Sir John Romilly, Sir W. Erle, Sir Edward Ryan, Mr. Lowe, Sir J. S. Willes and Mr. Macleod (*o*), who, in June, 1863, reported to her Majesty the completion of a portion of their task. This first instalment of a civil code received the force of law by Act x. of 1865. It relates wholly to "successions," and does not apply to the successions of Hindoos, Mahometans or Buddhists, or of any other sect which the governor-general may by order in council except from its operation. A further instalment, devoted to several branches of the law of contracts, and intended to be applicable to the whole population of British India, made its appearance in July, 1866. The method of the civil code is the same as that of the penal code. Every clause has been drafted with the utmost precision, and copious use has been made of illustrations, which the Commissioners declare to be "not merely examples "of the law in operation, but the law itself, showing by examples "what it is" (*p*). It is probable that the future effect of this great work will not be confined to our eastern empire. A code based upon the law of England, but in which all feudal peculiarities have been omitted, and such changes have been freely made as the advanced opinion of modern times seemed to require, can hardly fail to influence our home legislation (*q*).

(*o*) Mr. W. M. James and Mr. J. Henderson were substituted for Sir W. Erle and Mr. Justice Willes, in 1864. Mr. Macpherson and Mr. Baillie are the secretaries of the commission.

(*p*) A somewhat different force was given to them by the framers of the penal code, who said: "The illustrations make nothing law which would not be law without them," &c. (*Letter to the Governor-General*, Oct. 14, 1837.)

(*q*) We may perhaps be allowed to suggest that, in future editions, the Indian codes should be broken up into books, titles and chapters, duly subordinated to one another, and that the sections should commence *de novo* with each chapter, instead of, as now, running on continuously through a whole branch of law. And we would respectfully urge upon the commissioners the propriety of laying down beforehand some provisional plan of the whole work. Had such a plan been present to their minds they would surely never have treated of the liability of a master for the negligent driving of his coachman, under the head of agency, as a branch of the law of contracts. Second Rep. sect. 223. The use of the term "Substantive Law," in the sense in which it was defined by the commissioners in

II. There can be little doubt that England must soon make up her mind to do what the rest of the world has done, and what she has herself sanctioned in the case of some of her remote dependencies. People are now far too busy to be inclined to submit to unnecessary labour merely as an exercise of ingenuity. Even Englishmen will not much longer be persuaded that the most convenient way of making known a rule with which every citizen is presumed to be acquainted, is to leave it to be guessed at as the result of a comparison of perhaps fifty statutes and a score of reported cases. The absurdity of the present state of things has indeed long been recognized, but our legal reformers till of late years seem never to have conceived of any more sweeping improvement than some slight consolidation of tautologous statutes, and a repeal of such as are wholly obsolete. The common law was left untouched by the most audacious theorist. King Edward VI. long ago wrote: "I could wish that, when time shall serve, the superfluous and "tedious statutes were brought into one sum together, and "made more plain and short, to the intent that men might "better understand them" (*r*). And Lord Bacon's remarks are admirable as far as they go (*s*); but although many a commission has debated the subject from his time to the present day, and although of late certain preliminary steps have been taken towards improvement, it is literally true that no essential change has yet been effected in the form of English law. Indeed, a solemn conference of the two Houses of Parliament came to the conclusion in 1816 that even a consolidation of the statutes was impracticable. As we have already had occasion to remark, the reformers of the earlier part of the present century were necessarily so much engaged in carrying out material changes in the law as to have little leisure for its formal amendment.

The criminal legislation of Sir Robert Peel, which extended

India in 1845, and in which it is apparently still employed by the Indian Law Commissioners in England, as excluding penal law, appears to us very objectionable.

(*r*) See Burnet, History of the Reformation, vol. ii. pt. ii. p. 102, edit. 1829.

(*s*) 1 Law Tracts, 9, cf. De Aug. aph. 54—64.

from 1826 to 1832, did but little for the form of the law (*t*). The most tangible result of the criminal law commissions, which sat from 1833 to 1849, was a bill professing to be "A Digest "of the written and unwritten Law relating to the Definitions "of Crime and Punishment," which was introduced into the House of Lords in 1848, but was afterwards abandoned. For the appointment of these commissions we are indebted to Lord Brougham. In 1853 Lord Cranworth addressed a circular letter to the judges, requesting their opinions upon certain bills for consolidating the criminal law. The judges were unanimously opposed to the scheme, and their answers form a good collection of the usual objections to codification (*u*). Mr. Justice Talfourd, for instance, says: "To reduce the *statute law* into a "narrow compass is an object entirely free from objection, and, "if accomplished with care, can produce nothing but good; but "to reduce unwritten law to statute is to discard one of the "greatest blessings we have for ages enjoyed in rules capable "of flexible application."

To Lord Cranworth belongs the credit of having in 1854 appointed the "Statute Law Commission," which, after making numerous reports (*x*), and drawing up the Expurgation Act, 19 & 20 Vict. c. 64, came to an end in 1859. By this commission also were prepared the Criminal Law Consolidation Acts of 1861, which superseded the legislation of Sir Robert Peel. How little pretension these have to any methodical arrangement will appear from a bare enumeration of their subjects: 1. Accessories and abettors; 2. Larceny; 3. Malicious injuries to property; 4. Forgery; 5. Coining; 6. Offences against the person. The commission also, by causing accurate registers to be made of repealed statutes, prepared the way for those operations which immediately followed.

In 1860 Lord Westbury, then only Attorney-General, an-

(*t*) Although Anthony Hammond published, 1825-9, "by authority of Sir "Robert Peel," a draft criminal code, formed by a consideration of the then existing criminal statutes, which has some pretensions to method.

(*u*) Parl. Papers, 1854, liii. 391.

(*x*) Parl. Papers, 1855, xv. 829; 1856, xviii. 861; 1857, xxi. 203; sess. 2, xii. 211; 1859, sess. 2, xiii. pt. i. 1.

nounced the intention of the Government to take measures for the express repeal of all the obsolete Acts with which the statute-book was still incumbered. This great work of expurgation has just been completed by the skill and industry of Mr. Wood and Mr. Reilly; and a formidable list of wholly useless Acts has been upon their recommendation expressly repealed (*y*). The present Lord Chancellor, Lord Chelmsford, has announced that it is the intention of Government to exhibit the fruit of these labours in a revised edition of the statutes, containing only those which are actually in force, which will be accompanied by careful indices, and will, it is hoped, be comprised in about six or seven volumes.

In 1863, Lord Westbury, as Chancellor, in a great speech in the House of Lords, reviewed the whole subject. He proposed that, in addition to the work already in progress, a digest should be made of the reported cases, with a view to an ultimate combination of statutes and cases alike in a digest, and, at a future period, in a code, of the whole English law (*z*). In the autumn of 1866 a Royal Commission was issued to Lords Cranworth, Westbury and Cairns, Sir T. P. Wilde, Mr. Lowe, Vice-Chancellor Wood, Sir George Bowyer, Sir R. Palmer, Sir J. G. Lefevre, Sir T. E. May, Mr. Daniel, Mr. Thring and Mr. Reilly: "To inquire into the expediency of a Digest "of Law, and the best means of accomplishing that object, and "of otherwise exhibiting in a compendious and accessible form "the law as embodied in judicial decisions." It would have been difficult to name a list of Commissioners whose opinions upon the subject would carry greater weight, and their appointment will doubtless mark an epoch in the history of the question. Their first report, which is dated May 13, 1867, does little more than clear the ground for future operations, by affirming the utility of a digest, and recommending that they should be empowered to superintend the preparation of a portion of it, sufficient in extent to be a fair sample of the whole. The mode in which the Commissioners propose that the work shall be carried out will doubtless be described in future reports. In

(*y*) By 24 & 25 Vict. c. 101; 26 & 27 Vict. c. 125; and 30 & 31 Vict. c. 59.
(*z*) Hansard, vol. clxxi. p. 776.

the meantime we shall state with great diffidence what, in our opinion, is the end which should be aimed at in all efforts toward the formal amendment of the law, and what are the means by which that end is most likely to be attained.

III. The object which law reformers ought constantly to keep in view is the formation of a Code. The idea, whether it be regarded as immediately attainable or not, will be of inestimable value as the guide and regulator of their endeavours.

By a "Code," we mean a homogeneous body of law, axiomatically expressed and logically distributed. In all these essential characteristics it differs from a "Digest," which is a distributed body of law, but its distribution is not necessarily logical; nor is it homogeneous, becanse its ultimate subdivisions are merely groups of selected laws, each of which retains its individual vitality; nor need it be axiomatically expressed, because it may consist merely of extracts from reported cases. The most important of the processes by which a Digest is convertible into a Code, is "Consolidation;" but this is, of course, equally available for many operations of minor importance. It consists simply in fusing a number of separate rules into one new enactment. A Digest is, therefore, an imperfectly developed Code. The two differ only in degree, and, as compared with unsystematic law, stand very much in the same position.

It may appear surprising to any one who has considered the statements contained in the preceding pages, that there should still exist at the present day persons of eminence who are sturdy opponents of the introduction into English law of a logical in place of its present historical arrangement. One would suppose that the enormous evils of an unwieldy jurisprudence must be acknowledged on all hands; nor is one prepared to be told that difficulties which every other nation has attacked with success are insuperable by ourselves. Many, indeed, of those who are hostile to any general scheme of codification are willing to admit that the Acts of Parliament might be with advantage consolidated throughout; for it can hardly be pretended that anything but incredibly bad draughtsmanship could prevent them from being thus rendered much more accurate and acces-

sible than they now are. In the common law, however, as embodied in the reported cases, we are often assured that we possess an elastic rule, capable of adapting itself to new circumstances as they arise, such as we should seek in vain in any body of law imposed by legislation. Now, in point of fact, case-law is either perfectly definite or it is no law at all. A set of cases establishes a rule with certain exceptions; a new combination of facts arises; does it come within the rule or within the exceptions? The judge comes to a decision, which he arrives at either because the new case is virtually provided for by the old rule, or because, failing to find guidance in the cases cited, he is led by his own sense of what is just. If he is acting upon a rule which he finds laid down in the cases, that rule, the *ratio decidendi* of those cases, is of course a grammatically expressed proposition, and is no more susceptible of two senses than if it occurred in an Act of Parliament. If he is really, in the exercise of his own discretion, legislating for a *casus omissus*, and if this be considered desirable, it would be better that he should be allowed to do it without disguise. The judge who can be trusted to make law clandestinely, under cover of interpreting the reported cases, may also be trusted to make it openly, in order to supply the deficiencies of a code (*a*).

If the imaginary advantages of judge-made law in point of flexibility are disproved, few would be found to deny that it is necessarily accompanied by a host of inconveniences. Its enormous bulk, its confusion, and its preference for special rules rather than general principles, are some of these; to which may be added the incoherent and merely supplementary character which its predominance impresses upon the statutes (*b*). That it will ever cease to be a source of law is neither to be expected nor to be desired. All that can be wished is to sweep away and supersede all the case-law which exists at the present moment, and to provide, in a way which

(*a*) The utility of judge-made law at certain stages of civilization, when the enlightenment of the courts is superior to that of the legislature, is another question, and beside our present purpose. See Maine, "Ancient Law," ch. ii.

(*b*) See Austin, "Jurisprudence," vol. ii. p. 369.

we shall presently describe, for its periodical absorption, as it springs up again, into the Digest or Code.

The main objections urged against codified law are that its provisions will be rigid and inapplicable to new cases; this objection we have already discussed; and further, that being thus rigid, it ought to provide expressly for every conceivable case, which of course it will fail to do. These objections to a code have always appeared to us to rest upon a misapprehension of its real nature. Because it defines the *terminus a quo*, the general principles from which all legal argument must start, it seems to be imagined that it also defines the *terminus ad quem*, the extent of the application of which those principles are susceptible. A code is therefore asserted to be either an impossibility or an evil. An impossibility, if it attempts to state the infinite variety of subsidiary rules which must necessarily be recognized before its general rules can be applied to every case which may conceivably arise; an evil, if it rests satisfied with a statement of the law with reference to cases which have been already considered; because it must thus leave new cases wholly unprovided for. The fallacy upon which these alternative charges are grounded seems to be the idea that law when expressed in a code has any greater pretensions to finality than when expressed in statutes and reported cases (*c*). Clearness, not finality, is the object of a code. It does not attempt impossibilities, for it is satisfied with presenting the law at that precise stage of elaboration at which it finds it; neither is it obstructively rigid, for deductions from the general to the particular, and "the competition of opposite analogies," are as available for the decision of new cases under a code, as under any other form in which the law may be embodied (*d*).

(*c*) The true idea of a code is well described by the New York Commissioners as follows:—"All that we know of the law we know from written records. To "make a code is therefore but to make a complete analytical and authoritative "compilation from these records." M. Portalis ("Discours préliminaire du projet "de Code Civil," Locré, vol. i.) said well: "Tout simplifier, est une opération "sur laquelle on a besoin de s'entendre; tout prévoir, est un but qu'il est "impossible d'atteindre."

(*d*) Mr. Austin, whose lectures are a mine of thought upon the question of

If, as we hope, we have satisfactorily disposed of the principal objections to codification, it will be unnecessary to do more than briefly enumerate the obvious advantages of such a measure. A code, and the same remarks will apply though in a less degree to a Digest, will greatly popularise the knowledge of law. This is truly stated by the Digest Commissioners to be nothing less than a national duty. "Your Majesty's subjects," they say, "in their relations towards each other, are expected to conform "to the law of the state, and are not held excused, on the plea "of ignorance of the law, from the consequences of any wrongful "act. . . . It is, as we conceive, a duty of the state to take "care that these laws shall, so far as is practicable, be exhibited "in a form plain, compendious, and accessible, and calculated "to bring home actual knowledge of the law to the greatest "possible number of persons." The knowledge of law which under a well-arranged system is practically attainable by the people is much greater than may be imagined. There are many countries of Europe where the man of business is in the constant habit of consulting his code for guidance in his affairs, and where a certain acquaintance with the law of the land is made the condition of admission to a public employment. But a still more important point in favour of a code is, that it makes it possible for lawyers at least to know the law thoroughly. And this, not only because the law itself will be more rational, and therefore more knowable, but also because the profession will be released from those merely mechanical operations of bringing into juxtaposition statutes separated in date by hundreds of years, and cases decided without the remotest reference to each other, which at present absorb so much of their time and ingenuity; and will thus have leisure for attaining a real mastery of principles, and a habit of logically applying them to the new cases which will continually arise. In this way not only will the subject become better understood by the profession,

codification (see especially vol. ii. pp. 308—378, and vol. iii. pp. 275—298), maintains, in opposition to the distinguished writer of the article in vol. xxix. of the "Edinburgh Review," to which we have already had occasion to allude, that the "competition of opposite analogies" takes place as much under a code as under judge-made law.

but it will afford a better intellectual training to all who have to do with it. The existence of a code would also effect a vast improvement in our legal education, by providing it with an object susceptible of systematic study.

Legislation, it is almost needless to say, would be greatly facilitated by the existence of an authoritative statement of those laws upon which, by way of addition, subtraction, or alteration, the legislature has to operate. Local judicatures would be more readily established if a succinct body of law were always at hand for the guidance of the judge; and were our commercial law embodied in a definite division of a code, it would be possible, by mutual concessions, to assimilate it to the corresponding division in the codes of the Continent.

A code may or may not be attained *per saltum*. In times of revolution the law of a country has been occasionally recast in a very few years, or even months; but in these cases an old system of law has suddenly given place to a new one generally drawn from a foreign source (*e*). Here the matter of the law has itself been changed, but such a change is no essential accompaniment of the formation of a code, which is essentially only a re-expression of what previously existed in a less convenient form. Where however no important change in the matter of the law is contemplated, a code must be preceded by a digest; and, especially in a country where so much respect is paid to antiquity as in England, must be a work of much time and labour. A remark, made originally by Mr. Austin in a wider sense, is especially true as applied to codification: "What," he says, "is commonly called the *technical* part of legislation is "incomparably more difficult than what may be styled the "*ethical*. In other words, it is far easier to conceive justly "what would be useful law, than so to construct that same law "that it may accomplish its object (*f*).

Since the code, in the highest and modern sense of the term,

(*e*) The three codes for the kingdom of Greece, to which we alluded in p. 361, were drawn up in fifteen months. The so-called "codices" of the Roman emperors were likewise framed in a very short space of time, but these were, according to our present use of the term, mere "digests."

(*f*) Jurisprudence, vol. ii. p. 371.

which, as we have said, should be the ideal after which all legislation should strive, is to supersede both our written and our unwritten law, it must be produced by the union into one work of a common-law code and a statute code. It is our opinion that, to avoid confusion, each of these codes should be compiled separately; though of course upon the same plan, with a view to their ultimate unification.

For the compilation of each of them five processes are necessary. We shall consider these, first, in their application to the statutes, and, secondly, as applicable to the reports.

In order to the formation of a statute code, the Acts of Parliament must first undergo *expurgation*. The living statutes must be severed from the dead, and useless ones which still show some signs of vitality must be slain outright by the legisture. This process, which, as we have already stated, has been going on some time, is now on the point of completion. Elaborate registers have been constructed of all Acts heretofore expressly repealed, and more than three thousand Acts, or parts of Acts, which though not repealed were perfectly obsolete, have been repealed in express terms by the recent expurgation acts. The result is to be presented to the public in a revised edition of the statutes, vastly reduced in bulk by the omission of all that are no longer in force. We would, however, venture most respectfully to suggest to the Government, that this edition might be still further reduced in bulk and increased in utility, if before publication it were subjected to the process which we are about to describe. Nor would its progress thus be delayed for more than a month or two.

The next process may be called *sifting*, and is rendered necessary by the very heterogeneous character of our so-called "public-general" statutes, many of which apply exclusively to Ireland, Scotland, India and our colonial dominions. Now it hardly needs argnment to prove that, in collected bodies of statutes, Acts affecting England, or the whole of the United Kingdom, should form one body, while those affecting Ireland only, or India only, should form separate publications. It is scarcely less evident that only laws of a really "general" nature should be admitted into such collections; whereas numbers of

our public-general statutes differ only from avowedly "local and personal" and "private" Acts in having been introduced into parliament at the public expense. An Act confirming an order of the Home Secretary, made under the Local Government Act, for the improvement, say of Newcastle, is not a whit better qualified for a place among the statutes of the realm, from the accident of its being passed at the public expense, than if it had been introduced as a private Act by the corporation of that borough (*g*). Nor, again, should Acts be comprised in a permanent body of law which, although of a really general character, are operative only for the current year, or whose effect is exhausted in conferring exceptional powers upon the executive for some definite object. We would therefore get rid, by sifting, of (1) all non-English statutes; (2) all Acts which are really "local and personal," though technically "general;" (3) annual Acts; (4) what may be called mere "legislative warrants;" leaving only (5), true general English laws. Some idea of the reduction which this process would effect upon the Statute Book may be formed from the fact that out of 122 Acts passed in the Session for 1866, and occupying 1,007 pages, only 54, occupying 336 pages, answer the description of true general English laws (*h*).

The residuum of statute-law, after expurgation and sifting, must be *digested*. The nature of this process will be already understood from what has been said before. We may define a "Digest" as a distribution, according to a preconceived system, into books, titles and so forth, of a body of laws previously not so distributed, such laws retaining nevertheless their independent vitality, and being, under the ultimate subdivisions of the work, arranged in a merely arbitrary order. The first step towards the formation of a Digest is therefore the selection of a scheme of legal classification; which should be at once logical, suitable to the comparative importance of the conceptions upon which its

(*g*) [The statute book has been since partially relieved of acts of this nature, though in a very unscientific manner. See the address to the Law Amendment Society, printed later in this volume.]

(*h*) The rest are thus distributable under the other heads: (1) 33; (2) 18; (3) 9; (4) 8.

divisions are founded, and practically convenient (*i*). This scheme should be selected with the utmost care, and should be adhered to in all subsequent stages of the progress towards perfection. When it has been selected, the task of fitting the statutes, and parts of statutes, into their proper places, with references to the original statute upon which the authority of each depends, will be comparatively easy.

The next step is *consolidation*, the welding together into an organic whole of the various enactments upon a given topic. This process, operating upon the various fragments of Acts of Parliament arranged under any given head in the Digest, would annihilate their separate existence, omit their redundancies and fuse them into one new enactment. *Codification* is hardly so much a separate process as the completion of consolidation; for a code is a Digest in which every title has been consolidated. Being a Digest, it is orderly; being consolidated, it is homogeneous and organic. It speaks with its own voice only, and contains no trace of its constituent elements.

The common law code must be formed in the same way as the statute code. After the reports and such treatises as are acknowledged as sources of law have been cleared of dead law by expurgation, and of law not suitable for an English code by sifting, the residuum must be digested; the cases must be classified in accordance with the plan; and abstracts of them, or references to them, must be placed under the appropriate titles: some cases must be chosen to support universal, others to support particular propositions. Consolidation, and consequently codification, are inapplicable to common law as embodied in concrete cases, which must therefore be reduced to their net results stated axiomatically before they can be subjected to these processes.

Either the common law, or the statutes, or both, may of course remain for any length of time at the digest stage, in order to receive the most mature consideration before they are carried on into codes. It would probably be proper at the

(*i*) The final selection of such a scheme may, of course, be postponed till the stage of *codification*, and the arrangement of the digest may be merely provisional.

same time that the digests are promulgated, to abrogate and repeal, as independent sources of law, all the materials which have been employed in their construction. When the two codes are complete, both having been from the first arranged according to an identical method, they may be with ease woven into a single code, in which the distinction between common law and statute will have ceased to exist. Many important questions have been necessarily left unconsidered in our rapid sketch of a plan for the formal amendment of the law: such as the expediency of making any changes in the matter of the law at the same time that the improvements which we have described are effected in its form; and the bearing upon the subject of the English distinction between Law and Equity.

One essential point, however, remains to be noticed. One other process, which we may call *revision*, is necessary to perpetuate the good effects of those which we have already described. Expurgation, sifting, digesting, consolidation and codification may be effected once for all; but revision should be perpetually in operation, and could only be carried on by a permanent Law Council or department of Justice. The duties of such a council would be in the first place to superintend all legislation upon subjects treated of in the code (*j*); to see that all bills affecting this portion of the law were drawn according to a regular formula, and with expressed reference to a particular book, title and chapter of the code. The result of such supplementary Acts, or "novells," would be readily noted up by the practitioner. The council ought also to keep a watch upon, sift and classify the results of reported cases, and should from time to time cause bills to be introduced into Parliament embodying the new rules of law thus developed, and assigning to each its proper position as a new section of the code. Lastly, the council should, say at intervals of ten years, republish the code under the authority of Parliament; each new edition repealing the preceding one and embodying the results of the inter-decennial legislation and litigation. The absence of some such provision for the incorporation of new law as that which

(*j*) Many Acts of Parliament, it will be remembered, would have no place in, or effect upon, the code.

we have briefly suggested, and of an organ such as a permanent Law Council, by which the operation might be carried on, appears to us to be a grave defect in most schemes of codification, and greatly to impair the usefulness of those which have been realized in practice (*k*).

For the later stages of the progress towards perfection which we have attempted to describe, we shall doubtless have many years to wait; but there is no reason why the earlier stages should not be very speedily attained. Of one thing we feel confident—that when once the importance of the question shall be clearly recognized by the people, the day will not be far distant when our law will deserve a reputation for scientific form equal to that which it has long enjoyed for substantial equity.

(*k*) A periodical revision of the Code Frédéric seems to have been contemplated; a revised edition of the Russian Code has actually appeared; and the Indian Law Commissioners have recorded their opinion that "at intervals of only "a few years, the enacted law ought to be revised, and so amended as to make "it contain as completely as possible, in the form of definitions, of rules or of "illustrations, everything which may from time to time be deemed fit to be made "a part of it, leaving nothing to rest as law on the authority of previous judicial "decisions."

III.

Specimen of a Digest.

A. General Remarks.

B. Specimen of an Analytical Summary.

C. Specimen of portion in detail.

(*Submitted to the Digest Commission*, 31*st January*, 1868.*)

* See, upon this Commission, the Appendix. In printing these three hastily written papers, the Author has not felt himself at liberty to make any attempt at improving them.

A.

GENERAL REMARKS UPON A DIGEST.

It is proposed to offer, as briefly as possible, some observations: I. upon the specimens contained in papers B and C; II. upon the position which "servitudes" should occupy in a Digest of English Law; III. upon the method of forming such a Digest.

I. The accompanying papers—B and C—are put forward, not as samples of finished work, but merely as materials from which the Commissioners may form an opinion as to the writer's manner of working. The writer has no doubt that the Commissioners will view in this light the specimens which are submitted to them, and that they intended to do so when they set a task—no portion of which can receive the finishing touches till every other portion has been brought to a very advanced stage, and no plan of which as a whole can be determined upon till every one of its parts has been separately and most carefully scrutinized.

As has probably been the case with most of the competitors, the writer has prepared his specimens at such intervals, during the allotted two months, as he could spare from other engagements, and can therefore only hope that what he has produced may afford some indication of what he could produce under more favourable circumstances. He wishes also to add, that though he has preferred to work up these specimens alone, he is quite aware that for full and accurate treatment, when the business comes to be seriously undertaken, it would be essential that two minds should go over the ground together.

An attempt has been made in paper B to map out provisionally the whole subject of "servitudes;" in paper C to work out in detail that department of it which relates to "light." Finality in either case was, of course, out of the question. It was impossible, for instance, till every branch of the subject had been fully considered, to determine what rules may be exhibited once for all as of general application, and what are peculiar to special topics.

It will be noticed, that in paper C the results of the digested cases have not been formulated in the shape of rules, except roughly by way of marginal notes. Upon this point some remarks will be found further on, and it will be enough here to observe, that the deficiency (should it be considered such) could be supplied by an hour's work.

II. The subject of "servitude" is, in the first place, entirely a matter of substantive law.

It is conceived that "prescription" is in the New York system very erroneously relegated to the Code of "Procedure." It is essentially a mode of acquisition, and as such is a part of the substantive law. It might be contended with more plausibility that the remedies for the infringement of servitudes should be treated of in a Digest of Procedure Law. It is, however, submitted that this would be a mistake. To lay down that such or such an infringement entitles the party wronged to a prohibitory injunction, is substantive law; to indicate the steps by which an injunction (on whatever ground) is to be sought, is the office of the law of procedure.

"Servitudes," in the next place, are a branch of the law of property, as opposed to that of contract; and are, more specifically, a branch of the law of real (or immovable) property.

The distribution of the subject adopted in paper B is the result of considerable painstaking, necessitated by the very faulty arrangement which prevails in even so exceptionally good a text-book as that of Mr. Gale. The word "easement" also is in itself a great source of confusion. It is used in judgments in at least three senses,—viz.: (1) As including both easements and profits à prendre (so = "servitude"); (2) as opposed to profits, but including both easements in gross and

easements appurtenant; (3) while the celebrated definition in the *Termes de la Ley* is so framed as to include only easements appurtenant.

Whether the acquisition and loss of servitudes should be treated of in the same book which discusses their nature and qualities may of course be questioned; but it would probably be found better to treat of the whole law relating to a special kind of property in one place, rather than to define the natures of the various kinds of property in one book; placing the various modes of acquiring it in another, as is done in the French Code.

III. The following quotation from a pamphlet published by the writer about a year ago, may serve to show what, in his opinion, are the essential characteristics of a Digest:—"A *Digest* is . . . perfection" (*a*).

Whether or no each section of the Digest should be headed by a rule, deduced from the digested law, but expressed in the words of the compiler, appears to be a question of detail. The Commissioners, from some expressions which occur in their first Report, seem to contemplate the insertion of such rules. One of the advantages which would follow their introduction would be, that, should it be determined at any time to codify the law, the Digest would be convertible into a Code, merely by the excision of the matter intervening between the rules. Such rules have not however been prefixed to the sections of the accompanying specimen, marked B; though, if thought desirable, they might be added to it with the greatest ease. The marginal notes are designed to answer much the same purpose, though they have not been drawn up with that care and pains which ought to be expended upon them.

A further question arises as to the place of the Statute Law in a Digest. There is no doubt that such Statutes as are applicable to the matters treated of in the Digest should ultimately find a place there; but it has always appeared to the present writer, that the labour of making a Digest of the whole law would be considerably lightened if a separate Digest

(*a*) *Vide supra*, p. 17.

were constructed forthwith of such of the Statutes as are suited for the purpose. From the well ascertained nature of the materials, this might be accomplished in a very short time. A quotation upon this point from the pamphlet before alluded to may perhaps be pardoned:—"A Digest of the Statutes . . . usual way" (*b*).

The writer would add that he is prepared with a plan (in general outline) for the arrangement of a Digest of both case and statute law, and also with a (matured) scheme for the selection of such Statutes as are really general and permanent laws, in order to the compilation, from those only, of a Statute-Digest. He would also propose that for the future all bills of a similar character to these should be drawn with especial reference to the book, title and chapter of the Digest which are to be affected by them; while all other Acts, as well the so-called "public general," as the "local and personal" and "private," might be drawn, numbered and arranged much in the same way that they are at present.

The steps which seem proper to be taken in the formation of a Digest are as follows:—

(1) The Commissioners, having selected a scheme for the general arrangement of the whole field of English law, entrust definite portions to certain individuals.

(2) The persons entrusted with each portion proceed, after a general survey of the subject, to form a provisional plan of its arrangement.

(3) These provisional plans must be considered and compared by the Commissioners, with a view to preventing encroachments by one subject upon another.

(4) The workers on each topic would then proceed to read very carefully every case and every Act of Parliament bearing upon their subject, noting up the material under the several heads of their provisional plan.

(5) They would next abstract from the materials thus arranged under various heads such principles as they might find to be common to every head. These principles would then

(*b*) *Vide supra*, pp. 21, 22.

only have to be stated once for all, as applicable to the whole subject, and would not be alluded to again under the separate heads. The same process would have to be repeated again and again till all useless repetitions were eliminated.

(6) The topic to be treated in each title, chapter and section being finally determined upon, some modification of the general plan of each subject would probably follow.

(7) It would remain then to support each position by the best obtainable authority.

General rules should, when possible, be stated in the *ipsissima verba* of the judges. To establish the application of principles to complicated facts, *résumés* of cases must be given, which would resemble the "illustrations" of the Indian Law Commissioners.

(8) When a principle has always been clear law, it would probably be best supported by the earliest case in which it is well stated.

When the principle has at one time been doubted, an early and the latest good case should be cited. The cases should as far as possible be selected from those decided by the highest tribunals.

Where courts of co-ordinate authority have decided differently, their contradictory decisions should be quoted together, and attention should be called in a note, or by an obelus, to the discrepancy.

When a case overrules important preceding cases, it might be as well to mention them as overruled at the end of the case which overrules them.

(9) The work should then be sent in to the Commissioners, and printed and circulated among the Judges, and others, for comment. It should then be returned to its authors, that they may consider the comments thus made, and, after making such changes as seem requisite, return it to the Commissioners, who would again reprint all the contributions, but this time as a whole.

The degree of fulness with which the cases should be cited depends very much upon the service which the Digest is intended to render. If it is to be a mere guide to the Reports

and Acts of Parliament, the references might be very brief; but if (as may be hoped) it is meant ultimately to supersede them, and to be declared the only source from which the old law will be taken by the Courts, the quotations must obviously be so full that no possible doubt can arise as to their meaning. The Digest ought probably to be divided into "books," "titles," "chapters" and "sections," besides an ultimate numbering of the extracts as "articles;" but as it would be troublesome to specify all these distinctions in citation, it would be convenient to number the "articles" continuously all through a "title" (disregarding for this purpose the "chapters" and "sections," which will however be most valuable helps to a logical distribution of the subject). It would then only be necessary in citing the Digest, to mention the book, title and article (*e.g.*, Book III. Title 7, Art. 10; or merely III. 7, 10).

The Digest should, in the opinion of the writer, be confined to English law; endless confusion would result from any attempt to indicate in the same work what principles, and with what limitations, are applicable to Ireland, or other portions of the English empire. Indeed, the scope and extent of the work is one of the most important of the questions connected with the formation of a Digest. In this respect, as well as in the arrangement of its contents, it should be framed for the education as well as the convenience of the profession.

As was hinted above, after the publication of the Digest, the permanent and general Statutes of each year should be drawn with special reference to it, mentioning the book, title, chapter and section, which is to be modified. All such new Statutes, together with the sifted results of new cases, should be embodied in successive new editions of the Digest, to be issued by a permanent commission of distinguished lawyers.

The writer cannot conclude these remarks without apologizing for the very hasty way in which, from an exceptional pressure of other engagements, he has been compelled to put them together.

B.

SPECIMEN OF AN ANALYTICAL SUMMARY.

BOOK IV.

OF SERVITUDES.

PART I.

OF SERVITUDES IN GENERAL.

TIT. I.—THE NATURE OF SERVITUDES.

CH. I.—Definition.

CH. II.—How servitudes are distinguishable from corporeal hereditaments generally.

CH. III.—How distinguishable from joint ownership, and ownership limited in point of time.

CH. IV.—How from other incorporeal hereditaments and rights *in re aliena*.

CH. V.—How from certain rights described as "natural proprietary rights."

CH. VI.—How from rights conferred by licence.

TIT. II.—THE VARIOUS KINDS OF SERVITUDES.

(Adopting as the main division that into "easements" and "profits à prendre," which is not only beyond doubt the fundamental one in English law, but is also, it is submitted, far more philosophical than any of the distinctions recognized by the Roman lawyers and their copyists.)

PART II.

OF EASEMENTS.

TIT. I.—THEIR NATURE AND VARIETIES.

CH. I.—Definition.

CH. II.—They may be divided, according to their nature, into:

Affirmative and negative (the most important division);

Continuous and discontinuous;

Of necessity or not;

Apparent or not.

CH. III. Sect. 1.—They are divisible, according to the mode in which they are claimed, into:

Easements appurtenant (or real);

Easements in gross (or personal).

Sect. 2.—Easements appurtenant all reside in determinate persons (i. e. persons capable of taking by grant).

N.B. Here would come in the definition in the "*Termes de la Ley*," which is only applicable to easements appurtenant.

CH. III—*continued.*

Sect. 3.—Easements in gross:

Some easements cannot be in gross;

Easements in gross may reside in determinate or in indeterminate persons (see preceding sect.)

TIT. II.—ENUMERATION AND CHARACTERISTICS OF THE PRINCIPAL EASEMENTS.

(Chapters I.—XII. Affirmative Easements.)

CH. I.—Rights of way.

CH. II.—Of rendering the surface of the ground uneven by mining under it.

CH. III.—Of having spoil banks upon the surface.

CH. IV.—Of using a close for mixing muck.

CH. V.—Of hanging clothes over the land of another.

CH. VI.—Of burying in a vault.

CH. VII.—Of using a pew.

CH. VIII.—Of watercourse across a neighbour's land, and of going on the land to turn water into the same.

CH. IX.—Of discharging water on another's land.

CH. X.—Of polluting or diverting a stream.

CH. XI.—Of drawing water on another's land.

CH. XII.—Of carrying on an offensive trade.

(Chapters XIII.—XV. Negative Easements.)

CH. XIII.—The right to light. (*This subject is worked out in detail.*)

CH. XIV.—The right to air.

CH. XV.—The right to support from subjacent and adjacent soil.

TIT. III.—THE ACQUISITION OF EASEMENTS.

(Chapters I., II. Methods applicable to all Easements in determinate Persons.)

CH. I.—By grant.

Sect. 1.—

Sect. 2.—

Sect. 3.—(*This section—relating to light—is worked out in detail.*)

CH. II.—By prescription at common law.

Sect. 1.—

Sect. 2.—

Sect. 3.—(*This section—relating to light—is worked out in detail.*)

CH. III.—Special method applicable to ways, watercourses and most other affirmative easements:

The Prescription Act, sect. 2, &c.

CH. IV.—Special method applicable to light:

The Prescription Act, sect. 3, &c. (*in detail*).

CH. V.—The method applicable to all easements residing in indeterminate persons (i. e. persons not capable of taking by grant), viz. custom:

The requisites for a good custom;

How far regulated by the Prescription Act, sect. 2.

(Much confusion seems to be caused by the way in which "custom" and "prescription," as modes of acquiring, are opposed to one another; whereas the latter is surely only a peculiar species of the former. The use of "custom" to indicate a mode of acquiring by adverse possession is also much obscured by its other sense—of a "local law," such as gavelkind.)

TIT. IV.—OF THE EXTINCTION OF EASEMENTS.

CH. I.—By release.

Sect. 3.—(*As to light—in detail.*)

CH. II.—By consent to or acquiescence in an obstruction.

Sect. 3.—(*As to light—in detail.*)

CH. III.—By abandonment.

Sect. 3.—(*As to light—in detail.*)

CH. IV.—By unity of ownership.

Sect. 3.—(*As to light—in detail.*)

TIT. V.—OF THE DISTURBANCE OF EASEMENTS AND THE REMEDIES FOR THE SAME.

CH. I.—In the case of affirmative easements.

CH. II.—In the case of light (*worked out in detail.*)

CH. III.—As to the other negative easements.

PART III.

OF PROFITS A PRENDRE.

TIT. I.—THEIR NATURE.

CH. I.—Definition.

CH. II.—The right may reside in a person merely as an individual, and is then called a profit "in gross," or in him as possessor of a certain tenement, and is then called a profit "appurtenant."

The right can only reside in a determinate person; (this seems a less inverted way of saying that it cannot be claimed by custom), with certain exceptions, (1) copyholders,
(2) &c.,
(3) &c.

TIT. III.—HOW ACQUIRED.

CH. I.—By grant.

CH. II.—By prescription at common law.

CH. III.—When appurtenant they may also be acquired by prescription under sect. 1 of the Act.

TIT. IV.—HOW LOST.

TIT. V.—INJURIES TO THE RIGHT, AND REMEDIES FOR THE SAME.

PART IV.

OF SUCH SERVITUDES AS ARE IMPOSED BY THE STATE OR A PUBLIC BODY UPON PRIVATE PROPERTY, OR MAY BE GAINED BY PRIVATE INDIVIDUALS AGAINST THE PUBLIC.

C.

SUBDIVISION IN DETAIL,

COMPRISING

SUCH PORTIONS OF THE BOOK ON SERVITUDES AS RELATE TO THE EASEMENT OF LIGHT.

(*As to what has been aimed at in the compilation of this Subdivision of a Digest, see the remarks in paper* A.)

*** [It will be observed that this specimen was executed in accordance with the definition of a Digest laid down by the author elsewhere (*vide supra*, p. 17). Like the Roman Digest, it was intended to contain (as a general rule) the *ipsissima verba* of the law-sources.

It seems, however, that the Digest Commissioners are in favour of a bolder scheme, approximating very nearly to what the author means by a "Code" (*vide supra*, p. 18): that is to say, that the gentlemen employed by the Commissioners will be allowed to state the rules of law in their own language, merely referring to the statutes or cases as their authority. The result would be "a code with illustrations," like the Indian Code; or, if the references were ultimately dropped out, a true Code like that of New York.

If a Code thus formed should be received by the profession with such confidence that Parliament could be induced to enact it as law, no one would rejoice more than the author that the stage of a mere Digest had been passed over in this country, as in many others, *per saltum*.]

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Title II.

ENUMERATION AND CHARACTERISTICS OF THE PRINCIPAL EASEMENTS.

Chapter XIII.

THE RIGHT TO LIGHT.

Sect. 1.—Nature of the Proprietary Rights which are modified by this Easement.

Before the easement is acquired any one may open windows overlooking the land of his neighbour, who in return may build so as to block up the windows thus opened.

"Every man may open any number of windows looking over "his neighbour's land; and, on the other hand, the neighbour "may, by building on his own land, within twenty years after "the opening of the window, obstruct the light which would "otherwise reach it." Ld. Cranworth, *Taplin* v. *Jones*, 11 H. L. Ca. 290.

No right to privacy is recognized by the law.

"There is another form of words which is often found in "cases on the subject, namely, the phrase 'invasion of privacy "'by opening windows.' That is not treated by the law as a "wrong for which any remedy is given." Ld. Westbury, *Ibid.* (*Cf.* Turner, L. J., in *Johnson* v. *Wyatt*, 2 De G., J. & S. 18. *Cherington* v. *Abney*, 2 Vern. 645, to the contrary, is unsupported.)

Sect. 2.—The Nature of the Easement.

A right to prospect cannot be gained.

"For prospect, which is a matter of delight and not of ne- "cessity, no action lies for stopping thereof." Wray, C. J., *Aldred's Case*, 9 Rep. 576.

"Prospects may be stopped, so you do not darken the light." Twisden, J., *Knowles* v. *Richardson*, 1 Mod. 55. (So in *Att.-Gen.* v. *Doughty*, 2 Ves. sen. 45; *Fishmongers Co.* v.

E. I. Co., 1 Dick. 163; *Squire* v. *Campbell*, 1 My. & Cr. 486.)

The right cannot be acquired for an open space;

"The plea [of obstruction of light and air to a timber yard "and saw pit] was a very novel one, and one which, in his "opinion, could not be supported. If such a plea could be sus- "tained, it would follow that a man might acquire an exclusive "right to the light and air, not only as heretofore by having "been suffered to build on the edge of his property and suffered "for a certain space of time to enjoy that building without in- "terruption, but merely by reason of having been in the habit "of laying a few boards on his ground to dry. Such a rule "would be very inconvenient and very unjust." Patteson, J. (at N. P.), *Roberts* v. *Macord*, 1 Moo. & Rob. 230.

nor for an uninterrupted view of one's premises.

A man cannot acquire a right that the public shall have an uninterrupted view of his premises. Kindersley, V.-C., *Butt* v. *Imperial Gaslight Co.*, 14 W. R. 508; Ld. Chelmsford, C., *S. C.*, L. R., 2 Ch. Ap. 158; Wood, V.-C., *Smith* v. *Owen*, 35 L. J., Ch. 317.

SECT. 3.—THE EXTENT OF THE ENJOYMENT.

The right is not limited to its present user;

"The right conferred or recognized by the statute 2 & 3 "Will. 4, c. 71, is an absolute indefeasible right to the enjoy- "ment of the light, without reference to the purpose for which "it has been used. Therefore, even if the evidence satisfied "me, which it does not, that for the purpose of their present "business a strong light is not necessary, and that the plaintiffs "will have sufficient light remaining, I should not think the "defendant had established his defence unless he had shown "that, for whatever purpose the plaintiffs might wish to employ "the light, there would be no material interference with it." Ld. Cranworth, *Yates* v. *Jack*, L. R., 1 Ch. Ap. 295.

but this rule applies only where the general character of the

"The two authorities" (*Yates* v. *Jack* and *Martin* v. *Goble*, *q. v. infra*) "may be reconciled by saying that the Lord "Chancellor's observations may apply to the user of a house as "it stands, for any purpose for which it may be used in that "condition, not to the user of a house when its whole character

building remains the same;

" has been changed, and it has been rebuilt, leaving the old " windows untouched, as in the malthouse case." Wood, V.-C., *Dent* v. *Auction Mart Co.*, L. R., 2 Eq. 251.

and only where the claim is for an ordinary degree of light.

" It is plain that Lord Cranworth was there directing his " attention to a case where the plaintiffs are claiming only the " ordinary degree of light." Malins, V.-C., *Lanfranchi* v. *Mackenzie*, L. R., 4 Eq. 421.

The contrary view.

Lord Westbury, in the absence of any authority, and with much hesitation, decided that the right is limited to the extent of its present user. *Jackson* v. *D. of Newcastle*, 33 L. J., Ch. 698.

The right gained for a window is not extended to a material enlargement of it.

" In whatever way precisely the right to enjoy the unob- " structed access of light and air from adjoining land may be " acquired—still the act of the owner of such land, from which " the right flows, must have reference to the state of things at " the time when it is supposed to have taken place; and as the " act of the one is inferred from the enjoyment of the other, it " must in reason be measured by that enjoyment. The consent, " therefore, cannot fairly be extended beyond the access of " light and air through the same aperture (or one of the same " dimensions and in the same position) which existed at the " time when such consent is supposed to have been given." *Blanchard* v. *Bridges*, B. & Ad. 176.

A right to an extraordinary amount of light can only be acquired by known enjoyment of such an amount for twenty years.

" If there be a particular user, and the quantity of light " claimed for that is such as would not belong to the ordinary " occupations of life, a person who claims that extraordinary " quantity of light cannot establish his right to it unless he can " show that he has been in the enjoyment of it for twenty " years." . . . " If he has been in the enjoyment of an extra- " ordinary user for twenty years, that would establish the right " against all persons who had reasonable knowledge of it." Malins, V.-C., *Lanfranchi* v. *Mackenzie*, L. R., 4 Eq. 421.

Nor can a right to a less than ordinary amount be enlarged to a right

In an action for obstructing the lights of a house which had only seven years previously been converted from a malthouse into a parish workhouse, M'Donald, C. B., said, " This house " had for twenty years enjoyed light sufficient for a malthouse, " and up to this extent, and no further, the plaintiffs could still

to an ordinary amount except in the same way.

" require that light should be admitted to it." *Martin* v. *Goble*, 1 Camp. 322.

The right is not lessened by the use of blinds.

To an action for obstructing lights, the defence was, that the windows obstructed had till lately been shaded by blinds sloping upward which had prevented the plaintiff from seeing into the defendant's garden, but that the blinds had recently been taken down and the defendant's privacy injured. Lord Kenyon, after ascertaining that the plaintiff's house was darker in consequence of the defendant's obstruction than it had been while shaded by the blinds, said that "anything which tended to deprive a per- " son of the enjoyment of the light and air in the same quantity " to which his house was entitled as an ancient messuage, " entitled him to an action." *Cotterell* v. *Griffiths*, 4 Esp. 69. (So in *Yates* v. *Jack*, L. R., 1 Ch. Ap. 295; *Dent* v. *Auction Mart Co.*, L. R., 2 Eq. 251.)

The right is the same in town and in country.

" With respect to the right of the owner to be protected " against any obstruction to the access of light and air to win- " dows, there is no distinction between houses in towns and " houses in country." Kindersley, V.-C., *Martin* v. *Headon*, L. R., 2 Eq. 430. (Following *Yates* v. *Jack*, L. R., 1 Ch. Ap. 295, and *Dent* v. *Auction Mart Co.*, L. R., 2 Eq. 238, rather than *Clarke* v. *Clark*, L. R., 1 Ch. Ap. 16; *Curriers Co.* v. *Corbett*, 13 W. R. 1056; *Durell* v. *Pritchard*, L. R., 1 Ch. Ap. 244, and *Robson* v. *Whittingham*, *ib.* 442.)

Title III.

THE ACQUISITION OF EASEMENTS.

Chapter I.

BY GRANT.

Sect. 3.—In the case of Light.

Light is not the subject of actual grant.

"Light and air, not being to be used in the soil of the land of "another, are not the subject of actual grant; but the right to "insist upon the non-obstruction and non-interruption of them "more properly arises by a covenant . . . not to interrupt "the free use of the light and air." Littledale, J., *Moore* v. *Rawson*, 3 B. & C. 332.

If the owner of a modern house and land sell the house, neither he, nor a subsequent vendee of the land, may obstruct the lights of the house;

"If a man build an house upon his own ground, and then "grant the house to A., and grants certain lands adjoining to "B., B. could not build to the stopping up of A.'s lights." Ld. Hale, *Cox* v. *Mathews*, Ventris, 239.

"If a man have a vacant piece of ground and build there-"upon, and that house has very good lights, and he lets this "house to another, and after he builds upon a contiguous piece "of ground or lets the ground contiguous to another, who "builds thereupon to the nuisance of the lights of the first "house, the lessee of the first house shall have an action upon "this case against such builder, &c., for the first house was "granted to him with all the easements and delights then "belonging to it." Ld. Holt, *Rosewell* v. *Pryor*, 6 Mod. 116.

and it was said to be the same if

"The case was, a man erected a house on his own lands, and "after sells the house to one and the land adjoining to another,

the land is sold first and the house after;

" who, by putting piles of timber on the land, obstructed the " lights of the house: and it was resolved, that although it be " a new messuage, yet no person who claims the land by pur- " chase under the builder can obstruct the light any more than " the builder himself could, who cannot derogate from his own " grant, by *Twysden* and *Windham*, JJ., *Hyde* being absent " and *Kelguge* doubting . . . and *Kelguge* said, suppose the " land had been sold first and the house after, the vendee of " the lands might stop the lights." *Palmer* v. *Fletcher*, 1 Levinz, 122.

" The action is maintainable against a possessor holding as " tenant for an obstruction to a window existing in the land- " lord's house at the time of the demise, although of recent " construction, and that although there was no stipulation at the " time of the demise against the obstruction." Ld. Tenterden, *Riviere* v. *Bower*, 1 Ry. & Moo. 24.

or when the quasi-dominant and quasi servient tenements are sold at the same time.

Where two unfinished houses were sold together to different persons, spaces existing at the time which were intended for windows, and a plan having been also then produced in which the intended windows were indicated, it was said: " This pur- " chase must be taken to have been subject to certain conditions " at the time of sale, and as these unfinished houses were at " that time so far built as that the openings which were in- " tended to be supplied with windows were sufficiently visible " as they then stood, we must recognize an implied condition " that nothing would afterwards be done by which those " windows might be obstructed, and the purchasers must have " taken subject to what then appeared." Thompson, C. B., *Compton* v. *Richards*, 1 Price, 27.

" It is well established by the decided cases, that when the " same person possesses a house, having the actual use and en- " joyment of certain lights, and also possesses the adjoining " land, and sells the house to another person, though the lights " be new, he cannot, nor can anyone who claims under him, " build upon the adjoining land so as to obstruct or interrupt " the enjoyment of those lights. . . . The sales to the " plaintiff and defendant being sales by the same vendor, and " taking place at one and the same time, we think the rights of " the parties are brought within the application of the general " rule of law." *Swanborough* v. *Coventry*, 9 Bing. 305; *S. C.*,

2 M. & Sc. 362. *Cf.* the opinion of Parke, B., in *Pinnington* v. *Galland*, 9 Ex. 220.

"If indeed the builder of a house sells the house with the land "and appurtenances, he cannot build upon the remainder of the "ground so near as to stop the lights of the house; and as he "cannot do it, so neither can his vendee. But if he had sold "the vacant piece of ground, and kept the house without re- "serving the benefit of the lights, the vendee might build "against his house; but in the other case, when he sells the "house, the vacant piece of ground is by that grant charged "with the lights." Ld. Holt, *Tenant* v. *Goodwin*, 2 Ld. Raym. 1093. (Ld. Holt's opinion upon this point is also reported, though less fully, in 6 Mod. 314, but not in 1 Salk. 360.)

But it is now held that the rule only applies where the house is sold and the land retained.

This view is fully adopted in *White* v. *Bass*, 7 H. & N. 722. (*Cf. Suffield* v. *Brown*, 33, L. J., Ch. 249, where Ld. Westbury declared that the French doctrine of the "*destination* "*du père de famille*" is not recognized in English law, and that the rules as to creation of easements upon the severance of property rest upon the maxim that *no man may derogate from his own grant.*)

"There may appear to be some hardship in holding that the "owner of a close who has stood by, without notice or re- "monstrance, while his neighbour has incurred great expense "in building upon his own adjoining land, should be at liberty, "by subsequent erections to darken the windows, and so de- "stroy the comfort of such buildings. Yet there can be no "doubt of his right to do so at any time before the expiration "of twenty years from their erection, and this with good "reason." *Blanchard* v. *Bridges*, B. & Ad. 176.

No right is gained, under twenty years, by the mere acquiescence of the neighbour, at common law.

"If a party who has neglected to secure to himself rights so "important by previous express licence or covenant, relies for "his title to them upon anything short of an acquiescence for "twenty years, we think the onus lies on him of producing "such evidence as leads clearly and conclusively to the inference "of a licence or covenant. It is difficult, perhaps impossible, "to define the necessary amount of such evidence." *Ib.*

"Where new lights have been opened with the knowledge of "and without hindrance from a neighbour, that neighbour will "be restrained by a court of equity from obstructing them; and

In equity a person acquiescing in the

throwing out of new lights will not be allowed to obstruct them.

" the doctrine of Lord Eldon (in *Dann* v. *Spurrier*, 7 Ves. 231, " 235) applies. Lord Eldon said: 'This Court will not permit " 'a man knowingly, though but passively, to encourage another " 'to lay out money under an erroneous opinion of title; and the " 'circumstance of looking on is, in many cases, as strong as " 'using terms of encouragement.'" Romilly, M. R., *Cotching* v. *Bassett*, 32 Beav. 101.

Nor will his vendee.

And if the owner of land, adjoining to a building in which new lights have been thrown out with his acquiescence, sell the land, the vendee takes the land subject to the easement, although he has no notice of its existence. Ld. Chelmsford, *Miles* v. *Tobin*, 17 L. T., N. S. 432.

Chapter II.

BY PRESCRIPTION AT COMMON LAW.

Sect. 3.—In the case of Light.

By twenty years' user a presumption is raised of a grant.

" Every man, on his own land, has a right to all the light and " air which will come to him; and he may erect, even on the " extremity of his land, buildings with as many windows as he " pleases. In order to make it lawful for him to appropriate to " himself the use of the right, he does not require any consent " from the owner of the adjoining land. He therefore begins " to acquire the right to the enjoyment of the light by mere " occupancy. After he has erected his building, the owner of " the adjoining land may afterwards, within twenty years, build " on his own land, and so obstruct the light which would other- " wise pass to the building of his neighbour. But if the light " be suffered to pass, without interruption during that period, " to the building so erected, the law implies, from the non- " obstruction of the light for that length of time, that the owner " of the adjoining land has consented that the person who has " erected the building upon his land shall continue to enjoy the

"light without obstruction." Littledale, J., *Moore* v. *Rawson*, 3 B. & C. 332.

Nor is such a presumption rebutted by proof that the lights did not exist twenty-two years before the obstruction. *Penwarden* v. *Ching*, 1 Moo. & Malk. 400.

(Here it would be necessary to arrange the other cases upon lights at common law, especially those upon the persons who may acquire the right, and those against whom it may be acquired. It may, perhaps, be permissible to remark that by a slight modification of the provisions of Sect. 3 of the Prescription Act, as to the mode of computing the twenty years, this head of law might be entirely dispensed with. The cases on the custom of London would also here be necessarily inserted.)

CHAPTER IV.

SPECIAL METHOD OF ACQUISITION PECULIAR TO LIGHT.

SECT. 1.—THE STATUTE 3 & 4 WILL. 4, C. 71, S. 3.

"AND be it further enacted that when the access and use of "light to and for any dwelling-house, workshop, or other "building, shall have been actually enjoyed therewith for the "full period of twenty years without interruption, the right "thereto shall be deemed absolute and indefeasible, any local "usage or custom to the contrary notwithstanding, unless it "shall appear that the same was enjoyed by some consent or "agreement expressly made or given for that purpose by deed "or writing."

Sect. 4 (*q. v. supra*, Chap. III.) applies to this right.

Sect. 5 (*q. v. ibid*) applies also; except as to allegation of "enjoyment as of right." See *Merchant Taylors Co.* v. *Truscott*, 11 Exch. 855; *Frewen* v. *Phillips*.

Sect. 6 (*q. v. ibid.*) applies to this right.

Sects. 7 and 8 do not apply. See, as to Sect. 8, *Palk* v. *Skinner*, 18 Q. B. 568.

Sects. 9 and 10 (*q. v. ibid.*) apply to this right; but N. B., that by 21 & 22 Vict. c. 42 the Prescription Act is extended to Ireland.

SECT. 2.—NATURE OF THE ENJOYMENT NECESSARY UNDER THE ACT.

The enjoyment need not be as of right,

"The third section does not say 'when the access and use of "'light shall have been enjoyed *as of right*,' because every "person has a right to so much light as can come in at his "windows. The Prescription Act brought this to a simple "question: it says, that after twenty years' enjoyment without "interruption, the right shall be deemed absolute and inde-"feasible." Cresswell, J., *Truscott* v. *Merchant Taylors Co.*, 11 Exch. 855. *Cf. Flight* v. *Thomas*, 11 Ad. & E. 695.

but must be as an easement.

"What, then, is the enjoyment contemplated by the third "section? We think it clear, that notwithstanding the absence "of the words in the second section above referred to ('by any "'person claiming right thereto'), it converts into an easement "such an enjoyment only of the access of light over contiguous "land as had been had for the whole period of twenty years, in "the character of an easement, distinct from the enjoyment of "the land itself. The legislature contemplated such a right as "might be interrupted by the adjoining occupier at least during "some part of the time." Parke, B., *Harbidge* v. *Warwick*, 3 Exch. 552.

(Here would be inserted numerous cases bearing upon the interpretation of the Prescription Act as to,—the mode of calculating the twenty years; what constitutes "interruption;" the abrogation of the custom of London; the "consent or agreement in writing;" &c., &c. A few cases are set out below as to the rights of a reversioner.)

The right may be acquired under the act without the consent,

"It may be that if a man opens a light towards his neigh-"bour's land, the reversioner may have no means of preventing "a right thereto being acquired by twenty years' enjoyment, "unless he can prevail upon his tenant to raise an obstruction,

'or is able to procure from the other party an acknowledgment "that the right is enjoyed only by consent." Pollock, C. B., *Frewen* v. *Philips*, 11 C. B., N. S. 455.

or even knowledge, of the reversioner of the servient tenement.

"The right to window lights may now (as the enjoyment "need not be as of right) be gained, not only without the con-"sent, but also without the knowledge of the servient owner." Bramwell, B., *Jones* v. *Taplin*, 12 C. B., N. S. 853.

So Ld. Cranworth in *S. C.*, 11 H. L. 312, and Wood, V.-C., in *Simper* v. *Foley*, 2 Johns. & H. 555.

TITLE IV.

EXTINGUISHMENT OF EASEMENTS.

CHAPTER I.

BY EXPRESS RELEASE UNDER SEAL.

SECT. 3.—IN THE CASE OF LIGHT.

(*Qy. whether any examples?*)

CHAPTER II.

BY ACQUIESCENCE IN OR CONSENT TO AN OBSTRUCTION.

SECT. 3.—IN THE CASE OF LIGHT.

What amount of acquiescence will extinguish the easement in equity.

WHERE the acquiescence is not very decided, equity will grant relief against the obstruction at the hearing of the cause.

A slight amount of acquiescence will disentitle the plaintiff to an interlocutory injunction against the continuance of the obstruction. L. JJ., *Johnson* v. *Wyatt*, 33 L. J., N. S., Ch. 394.

Acquiescence may be pleaded at common law.

A plea of acquiescence and replication of fraud, both on equitable grounds, held good in *Davies* v. *Marshall*, 10 C. B., N. S. 1.

CHAPTER III.

BY ABANDONMENT.

SECT. 3.—IN THE CASE OF LIGHT.

What amounts (at common law) to an abandonment of lights.

"WE must consider the enjoyment as giving the right, and "that it is a wholesome and wise qualification of that rule to "say that the ceasing to enjoy destroys the right, unless at the "time when the party discontinues the enjoyment he does some "act to show that he means to resume it within a reasonable "time." Bayley, J.

"It seems to me, that if a person entitled to ancient lights "pulls down his house and erects a blank wall, and suffers that "blank wall to continue for a considerable period of time, it "lies upon him at least to show, that at the time when he so "erected the blank wall, and thus apparently abandoned the "windows which gave light and air to the house, that was not "a perpetual but a temporary enjoyment, and that he intended "to resume the enjoyment within a reasonable period of time." Abbott, C. J.

"In this case the building of a blank wall is a stronger cir-"cumstance than if he had merely pulled down the house." Littledale, J., *Moore* v. *Rawson*, 3 B. & C. 332.

A window having been filled up with brick and mortar above twenty years, Lord Ellenborough held that the case stood as if it had never existed. *Laurence* v. *Obee*, 3 Camp. 514.

If an intention to abandon lights has been communicated to the owner of the servient tenement, *quære* whether, until such owner has altered his position in reliance upon the intention so communicated, the right is destroyed. *Stokoe* v. *Singers*, 8 Ell. & Bl. 31.

Defendant having argued that a flue erected by the plaintiff created the same obstruction as that complained of, it was held that, "nothing short of an act on the part of the plaintiff which "created an obstruction somewhat to the amount of that which "was complained of could deprive a plaintiff of the right to an "injunction." *Arcedeckne* v. *Kelk*, 2 Giff. 683.

"It would seem that it (the right acquired by twenty years'

" user under the Act) cannot be lost or defeated by a subse-
" quent temporary intermission of enjoyment, not amounting to
" abandonment." Ld. Westbury, *Taplin* v. *Jones*, 11 H. L. 290.

The tests of abandonment.

When a plaintiff, having acquired a right to light to his windows, blocks them up, and the defendant, while they are blocked up, purchases the servient tenement and commences building on it, so as to obstruct the windows if open, whereupon the plaintiff opens them and sues for the obstruction; the plaintiff's right to recover depends on two points—that he did not close his lights so as to lead the defendant to incur expense or loss on the reasonable belief that they had been permanently abandoned, nor so as to manifest an intention of permanently abandoning the right of using them. *Stokoe* v. *Singers*, 8 Ell. & Bl. 31.

The opening of a new window is in itself an innocent act, which does not operate as a forfeiture or abandonment of the right to an ancient window.

" Suppose, then, that the owner of a dwelling-house with
" such a window, that is with an absolute and indefeasible right
" to a certain access of light, opens two other windows, one on
" each side of the old window, does the indefeasible right become
" thereby defeasible? By opening the new windows he does no
" injury or wrong, in the eye of the law, to his neighbour, who is
" at liberty to build up against them, so far as he possesses the
" right of building on his land; but it must be remembered that
" he possesses no right of building so as to obstruct the ancient
" windows, for to that extent his right of building is gone by the
" indefeasible right which the statute has conferred." Ld. Westbury, *Taplin* v. *Jones*, 11 H. L. 290.

A neighbouring owner may therefore block up the new light only when he can do so without interfering with the old one.

" The plain principle appears to me to be, that no one can
" interfere with the absolute and indefeasible right of another,
" unless where such interference is made necessary by the
" wrongful act of the party possessing the right." Ld. Cranworth, *Ibid.*

" The owner of the privileged window does nothing unlawful
" if he enlarges it, or if he makes a new window in a different
" situation. The adjoining owner is at liberty to build upon
" his own ground so as to obstruct the addition to the old
" window, or to shut out the new one; but he does not regain
" his former right of obstructing the old window, which he had
" lost by acquiescence; nor does the owner of the old window
" lose his former absolute and indefeasible right to it, which he

"had gained by length of time." Ld. Chelmsford, *Ibid.* (This case overruled *Renshaw* v. *Bean*, 18 Q. B. 112, and *Hutchinson* v. *Copestake*, 9 C. B., N. S. 863, with many others. Though decided upon the statute, its reasoning seems to apply equally to cases of prescription at common law.)

Chapter IV.

BY UNITY OF OWNERSHIP.

Sect. 3.—In the case of Light.

"If I have an ancient house and lights, and I purchase the "next house or ground when yet no nuisance is done to my "former house, now it is clear that my privilege against that I "have purchased ceaseth, for I may use mine own as I will. "Now then suppose I would lease my former house, I may "build upon the latter, or, if I lease my latter, he may build "against me as it may seem." *Robins* v. *Barnes*, Hobart, 173; 1 Ro. 937; Sid. 167.

The easement is extinguished by union of the ownership of the dominant and servient tenements.

"If I am seised of freehold premises and possessed of lease- "hold premises adjoining, and there has formerly been an "easement enjoyed by the occupiers of the one as against the "occupiers of the other, while the premises are in my hand the "easement is necessarily suspended, but it is not extinguished, "because there is no unity of seisin, and if I part with the "premises the right not being extinguished will revive." Alderson, B., *Thomas* v. *Thomas*, 2 Cr. M. & R. 41.

This is only the case where there is a unity of seisin; where there is but a unity of possession the easement is only suspended.

"I apprehend it is clear that the effect of an union of the "ownership of dominant and servient tenements for different "estates is not to extinguish an easement of this description "(i.e. of light), but merely to suspend it so long as the union "of ownership continues; and that upon a severance of the "ownership the easement revives." Wood, V.-C., *Simper* v. *Foley*, 2 Johns. & H. 555.

TITLE V.

DISTURBANCE OF EASEMENTS AND REMEDIES FOR THE SAME.

CHAPTER II.

IN THE CASE OF LIGHT.

What disturbances give a right of action at law.

"IN order to give a right of action, and sustain the issue, "there must be a substantial privation of light sufficient to "render the occupation of the house uncomfortable, *and* to "prevent the plaintiff from carrying on his accustomed business "on the premises as beneficially as he had formerly done." Best, C. J., *Back* v. *Stacey*, 2 C. & P. 466.

"With the single exception of reading *or* for *and*, I appre- "hend that the above statement correctly lays down the "doctrine in the manner in which it would now be supported "in an action at law." Wood, V.-C., *Dent* v. *Auction Mart Co.*, L. R., 2 Eq. 245.

"It is not every possible, every speculative, exclusion of "light which is the ground of an action; but that which the "law recognizes, is such a diminution of light as really makes "the premises to a sensible degree less fit for the purposes of "business." Tindal, C. J., *Parker* v. *Smith*, 5 C. & P. 438.

"To sustain this action there must be a considerable obstruc- "tion of light, and the merely taking off a ray or two will not "be sufficient." Ld. Denman, *Pringle* v. *Wenham*, 7 C. & P. 376. *Cf. Embrey* v. *Owen*, 6 Exch. 353.

When a remedy is given in equity.

"There are many obvious cases of new buildings darkening "those opposite to them, but not in such a degree that an "injunction could be maintained, or an action on the case,

" which however might be maintained in many cases which " would not support an injunction." Ld. Eldon, *Attorney-Gen.* v. *Nichol*, 16 Ves. 343.

" Where substantial damages would be given at law, as " distinguished from some small sum of 5*l.*, 10*l.*, or 20*l.*, this " Court will interpose." Wood, V.-C., *Dent* v. *Auction Mart Co.*, L. R., 2 Eq. 238.

" Wherever it is shown that the comfort or enjoyment of a " man or his family in the occupation of his house is seriously " interfered with, and still more where he is prevented from " carrying on his business with the same degree of convenience " and advantage as theretofore, by reason of the abstraction of " light caused by his neighbour's new buildings, there is suffi- " cient ground for the interference of this Court." Kindersley, V.-C., *Martin* v. *Headon*, L. R., 2 Eq. 425.

" When the obstruction of the ancient lights of a manufactory " or of business premises renders the buildings to a material " extent less suitable for the business carried on in them, it is, " in my judgment, a case for an injunction, and not merely for " compensation in damages. The foundation of the jurisdiction " appears to be, that injury to property which renders it in a " material degree unsuitable for the purposes to which it is now " applied, or lessens considerably the enjoyment which the " owner has of it. The Court considers that injury of this " nature does not admit of being measured and redressed by " damages." Ld. Westbury, *Jackson* v. *D. of Newcastle*, 33 L. J., N. S., Ch. 698.

Where an injunction will not be granted.

" The Court would probably not interfere (not merely when " the right is of short duration, for I have interfered in cases of " very short duration with reference to the obstruction of light), " but when the whole of the property is about to cease imme- " diately—as for instance in the case of notice given under a " Railway Act to take a house." Wood, V.-C., *Dent* v. *Auction Mart Co.*, 2 L. R., Eq. 238.

An injunction refused when title doubtful and there was no reason for hurry. *Winstanley* v. *Lee*, 2 Swans. 333.

"It seems to me that when, opposite to ancient lights, a wall " is built not higher than the distance between that wall and " the ancient lights, there cannot be, under ordinary circum- " stances, such a material obscuration of the ancient lights as

" to make it necessary for this Court to interfere by way of " injunction." Stuart, V.-C., *Beadel* v. *Perry*, L. R., 3 Eq. 465.

An upright screen of translucent fluted glass, having slanting openings in its framework for the passage of air, raised to a height of thirty-five feet from the ground, and at a distance of thirty feet from the windows of an adjoining house, is not such an obstruction of light and air as the Court will interfere with by injunction. *Radcliffe* v. *D. of Portland*, 3 Giff. 702.

Where the plaintiff is guilty of laches in coming for an injunction, he will be left to his remedy at law. *Cooper* v. *Hubbuck*, 7 Jur. 457. *Cf. Senior* v. *Pawson*, 15 W. R. 226.

Where an offer is made which will have the effect of putting the plaintiff in as favourable a position as before the erection of the obstruction, the Court should not interfere to compel pulling down or restrain completion of the building. *Low* v. *Innes*, 10 Jur., N. S. 1037.

When equity will grant a mandatory injunction.

" This jurisdiction, so far as it partakes of the nature of a " preventive remedy, that is prohibition of further damage, or " an intended damage, is a jurisdiction that may be exercised " without difficulty, and rests upon the clearest principles. " But there has been superadded to that the power of the Court " to grant what has been denominated 'a mandatory injunction,' " that is, an order compelling a defendant to restore things to " the condition in which they were at the time when the " plaintiff's complaint was made. The exercise of that power " is one that must be attended with the greatest possible caution. " I think, without intending to lay down any rule, that it is con- " fined to cases where the injury done to the plaintiff cannot be " estimated and sufficiently compensated by a pecuniary sum." Ld. Westbury, *Isenberg* v. *East India House Estate Co.*, 33 L. J., N. S., Ch. 392.

" No general rule can be laid down, that relief by way of " injunction will be refused wherever the damage has been " completed before the bill was filed; but every case must " depend upon its own circumstances, and the Court will not " interfere by way of mandatory injunction, except in cases in " which extreme, or at all events very serious, damage will " ensue from its interference being withheld." L. JJ., *Durell* v. *Pritchard*, L. R., 1 Ch. Ap. 251.

A court of equity may sometimes assess and award damages.

" A Court of Equity is not obliged under 25 & 26 Vict. c. 42, " to award damages for disturbance of an easement; it may " award them under 21 & 22 Vict. c. 27." *Ibid.*

An enquiry with a view to awarding damages was ordered by the Court of Chancery in *Isenberg* v. *East India House Estate Co., ubi sup.;* was refused in *Johnson* v. *Wyatt*, 33 L. J., N. S., Ch. 394, and in *Durell* v. *Pritchard, ubi sup.*

" Where the defendant's buildings are completed, and are of " considerable importance, while that of the plaintiff is com- " paratively of small value and importance, the Court will " rather award compensation in damages to the plaintiff than " order the defendant's buildings to be pulled down." Kindersley, V.-C., *Curriers Co.* v. *Corbett*, 2 Dr. & Sm. 355.

The Court refused to appoint a person under 15 & 16 Vict. c. 86, to survey the property before the hearing. *Stokes* v. *City Offices Co.*, 13 L. T. (N. S.) 81.

Liberty given to the defendant to apply at chambers in order to learn whether the works he proposed to carry out would be an interference with the easement. *Ib.*

An injunction may sometimes be obtained at common law.

An injunction granted at common law. *Jessel* v. *Chaplin*, 2 Jur., N. S. 931.

Compensation for injury to light under the Lands Clauses Act.

By certain works done by a railway under their act of parliament, a diminution of light was caused to the plaintiff's house, though the value of the house was otherwise enhanced, so as upon the whole not to be diminished in value. It was held that an easement is an interest in land for damage to which compensation may be claimed under 8 & 9 Vict. c. 18, and that it was no answer that by reason of accidental circumstances the saleable value of the premises was not diminished. *Eagle* v. *Charing Cross Rail. Co.*, L. R., 2 C. P. 638.

Person to sue—need not be the occupier;

The Court will restrain an obstruction to light, though the plaintiff is not the occupier of the house and may have no intention of occupying it. *Wilson* v. *Townend*, 30 L. J., Ch. 25.

may be tenant from year to year;

A tenant from year to year may file a bill for an injunction, but the injunction will be limited to the duration of his tenancy. *Simper* v. *Foley*, 2 Johns. & H. 555.

or merely under agreement for a renewal of an expired lease;

A lessee whose term has expired, but who has agreed for a renewal, may maintain a suit for obstruction. *Gale* v. *Abbot*, 8 Jur., N. S. 987.

or reversioner.

A reversioner may sue for an obstruction to light, not only when the obstruction is of a permanent nature, but also when its continuance may afford evidence in denial of his right. *Shadwell* v. *Hutchinson*, M. & M. 350; *Bower* v. *Hill*, 1 Bing., N. C. 555; *Metropolitan Association* v. *Petch*, 5 C. B., N. S. 504.

(Here should be noticed also the cases as to the person to be sued.)

PART II.

WITH SPECIAL REFERENCE TO THE STATUTES:

CONTAINING

IV. The Reform of the Statute Book.

V. The Statute Book for 1866.

VI. A New Edition of the Statute Book.

VII. The Statute Book.

VIII. The Pitfalls of the Statute Book.

IX. The Classification of the Statutes.

X. Additional Note.

IV.

The Reform of the Statute Book.

(*From the Fortnightly Review*, 15*th September*, 1866.)

THE REFORM OF THE STATUTE BOOK. (a)

THERE was once a time when the study of the law formed part of the education of the finished English gentleman; and as late as the middle of the last century, Sir William Blackstone taught at Oxford that "a competent knowledge of the laws of that "society in which we live is the proper accomplishment of every "gentleman and scholar." At the present day, as a rule, even the well-educated Englishman knows just as much about law as he knows about physic, and no more. In common with the classes below him, he is, when he wishes to ascertain the rights or remedies to which he is entitled, absolutely in the hands of his professional advisers. There is no doubt that the gulph between lawyer and layman has widened. Abstruse as was the feudal system of jurisprudence, it at least was a system, and as such capable of being scientifically studied. On the other hand, every year of the later centuries of English history has witnessed the rise of endless new provisions, which, while they met the wants of new states of society, have not only ruined the symmetry of the old system, but have added to it a mass of detail which can be mastered only by the devotion of a lifetime. Such a state of things is by no means satisfactory. Every citizen should be able to form a general conception of the rights and duties of which the law always supposes him to be cognizant, and every educated man should, besides this, have some acquaintance with the scientific principles by which the legislation of his country has been guided.

(a) *Fortnightly Review*, 15th September, 1866.

That such knowledge should be possible, implies of course that the law should possess some principles, and should be formed by some method. Where method is present, it is almost as easy to grasp a thousand details as a hundred. By strict sub-division of departments, the steam iron-foundry, which has been called into existence by the necessities of modern commerce, is managed probably with little more difficulty than the village forge, of which it is the development. But law has not been so wise in this respect as commerce. Method has never been called in to organise the enormously increased mass of legal detail which is the unavoidable accompaniment of modern civilization; and the result is a jungle through which only the most dexterous lawyers can thread their way in safety, and from which all wise unprofessional people keep at a respectful distance.

Existing English Law has, as most people are aware, two principal sources.

First, the Common Law of the realm—a collection of rules of immemorial antiquity, modified from time to time by judicial interpretation to suit the wants of a growing people.

Secondly, new rules, altering or added to the rules of the Common Law, and imposed upon the country by the act of the legislature. These rules are known as the Statute Law.

Both kinds of law are, in their present state, equally open to the charge of want of method; and both are, consequently, in this respect, in equal need of reform. It is obvious, however, that in order to reform a system of rules, it is necessary in the first place to know exactly what those rules are. Now, the rules of the common law can be learnt only from the (sometimes discordant) utterances of living judges, and from the (also sometimes discordant) utterances of their learned predecessors; and these utterances are embalmed, in the midst of mountains of irrelevant matter, in reports of cases decided at different times during a period of 500 years, and contained in not less than 1,200 volumes.

The statutes, on the other hand, although the product of many centuries of legislation, are all ready to our hand, and are contained in, say, fifty quarto volumes. It is, therefore, far

easier to discover what is statute law than what is common law, and proportionably easier to introduce method into the former than into the latter. In fact, the first step in Law Reform is obviously the reform of the Statutes. This alone has hitherto been attempted by Parliament, and to this alone will our remarks be confined on the present occasion. The subject is really one of the utmost importance to every Englishman, while the principles it involves are such as without any black-letter lore he is quite capable of understanding.

The mere statement of the present condition of the statute law is its sufficient condemnation. Every one must have derived from newspaper reports of the debates in Parliament some idea of the multitude and the incongruous character of the measures which each year become law. A six months' suspension of the *habeas corpus*, and a reconstruction of the law of bankruptcy; the marriage portion of a royal princess, and a system of precautions against the spread of a cattle plague; a change in the electoral franchise, and a plan for the improvement of workhouses; all these objects are effected by Acts of Parliament, and all so-called "public general" Acts of Parliament—whether they establish a tribunal destined to last for centuries, or grant an annuity to the doorkeeper of an abolished public office; whether they apply to the whole of the United Kingdom, or merely authorize the government to sell a house in Leadenhall Street—take their place for ever, one after another, in chronological order, amongst the statutes of the realm. But the legislation of a year does not stop here. Endless acts are also passed giving extraordinary powers to railway companies, dock companies, corporations, and boards of every kind, and not a few affecting only single families or single individuals. Such are acts empowering trustees to do what they are not allowed to do by the terms of their trust, or an Act to enable the Reverend Jones Smith to hold any benefice in the United Kingdom to which he may be presented, any disability notwithstanding.

The total number of Acts passed in the last session was 415. They do not, however, all form part of the collection which is generally spoken of as "the statutes" of 1865. A rude system

of classification has grown up, without any distinct legal recognition, which divides the Acts of each year, according to the manner in which they were introduced into Parliament, into—

(1.) Public general, of which there passed last year, 127;

(2.) Public, local and personal, of which there passed 278;

(3.) Private, of which there passed 10;

And the "public general" are alone generally considered as "the statutes" of the year.

This arrangement is, however, entirely unscientific. Not a few "local and personal" Acts might well have been included in the "public general," and a vast number of the "public "general" ought to be relegated to a position among the "local "and personal."

The distinction, however, though ill carried out, is a true one, and lies at the root of all plans of re-arrangement. The laws which affect the whole nation are *par excellence* laws, and should be presented to the nation disencumbered of all those enactments which affect only definite localities or definite individuals. How little this object is even aimed at under the present system, will be apparent from an analysis of the so-called public general Acts of last session.

They may be roughly grouped under the following heads:—Ireland, 20 Acts; Scotland, 9; Colonies and India, 7; armed forces, annual enactments, 3; the revenue of the year, 5; certain public works, 7; indemnity, 1; certain counties and places, 8; certain private matters, 1; confirmations of orders by certain administrative bodies, 16; Parliament, 3; the Church, 5; the Universities, 1; the armed forces, 7; docks and harbours, 2; administration of justice, 6; police, 1; prisons, 1; customs and excise, 6; pensions, 1; poor, 2; lunatics, 1; companies, 1; partnership, 1; wills, 1; carriers, 1; patents, 1; sewage, 1; locomotives, 1; public-houses, 1; dogs, 1; salmon, 1; to continue an Act, 1; foreign jurisdiction, 1. Total, 125.

Under the first 10 heads we have grouped 77 Acts; under the remaining heads, 48. The arrangement only professes to be accurate enough for purposes of illustration, but, subject to this observation, it is submitted that the 77 Acts grouped under heads 1 to 10 have no right to a place in the statute book at all.

In the first place the accident of the English Government being at the head of a vast colonial empire, as well as of the kingdom of England, is no valid reason for encumbering the statute book of the realm with those colonial laws which it happens to be necessary to pass in the Imperial legislature. Laws affecting Canada only, or India only, must of course be officially printed, and must not only be communicated to such parts of the world as they may concern, but must also be accessible in England, because England contains the supreme legislature, executive and court of appeal of the empire. Such enactments, however, form no part of the law administered in the ordinary courts of justice, and should form no part of the English statute book. The same reasoning would expunge also laws affecting only Scotland and Ireland.

Another set of enactments which might well be banished from their present position, are those which merely keep in motion the machinery of government during the current year. These we have grouped under heads 4—7. They are really in the nature of warrants issued by the sovereign power to its officers, empowering them to do certain definite acts, or cheques drawn by the same power upon its banker. Some of them may doubtless have to be pleaded in the ordinary law courts, during the year of their currency, and perhaps even after that year, but this alone is of course no proof that an enactment is a real law.

Under heads 8—10 we have placed those laws which, though now printed as public general Acts, are essentially local or personal.

Acts re-arranging the sessional divisions of the county of Sussex, or for discontinuing the borough gaol at Falmouth, are more analogous to Royal charters than to laws proper. It may doubtless be questioned whether Acts applicable to the metropolis only are to be considered of this nature, or whether, since they affect the seat of government, they should be treated as of a "public" character.

Of a distinctly local character are the numerous Acts passed to give validity to acts done by various administrative bodies in excess of their inherent powers. These, which should properly

be private Acts, are made "public general," merely to save expense to the parties concerned. It is scarcely necessary to add that "An Act to render valid Marriages heretofore solem-"nized in the Chapel of Ease called St. James the Greater "Chapel, Eastbury, in the Parish of Lamborne, in the County "of Berks," is very ill-described as a "public general" statute.

We have shown cause for the elimination—I. of statutes which have no reference to England; II. of statutes which merely keep in motion for the year the machine of government; III. of statutes which affect only certain localities or certain individuals in England. These last year amounted to 77. There were also in the same year 278 so-called "public, local "and personal," and 10 avowedly private Acts; giving thus a total of 365 Acts which have no valid claim to a place in the statute book. They differ widely amongst themselves, and greatly need improved classification, but have one property in common—that they are not properly laws of the realm: and this excludes them from our consideration. The legislative result of the year 1865 is, therefore, reducible to the fifty Acts which we have arranged under the heads 11—34. That is to say, we have, in idea, reduced the statute book of last year to less than half its actual bulk. The same process applied to the statute book as a whole, would obviously reduce the fifty volumes of which it at present consists to twenty-five.

This satisfactory result would be accomplished simply by excluding from our collection of public laws all enactments which are not public laws. This process we will call *sifting*. But some other processes should follow the first. An enormous number of Acts and sections of Acts either have been expressly repealed, or have become, from the changed circumstances of the nation, practically obsolete. These should evidently be weeded out of the statute book, of which they constitute perhaps half; and the process of weeding them out is well described as *expurgation*.

Sifting and expurgation would reduce the statute book from fifty volumes to perhaps ten. The diminution in bulk would be in itself a great gain; but evils even worse than excessive bulk would remain uncured. These evils are due to the merely

chronological order in which the statutes are arranged, and will be at once understood by an instance.

At common law neither the plaintiff nor the defendant were entitled to get the costs of an action in which he was successful paid them by the losing party. It was, however, provided by the statute of Gloucester (6 Edward I. c. 1) that the plaintiff, in all actions in which he recovers damages, shall also recover against the defendant his costs of suit, and in almost every reign from that time to the present, statutes have been passed extending, varying and abridging the claim of the successful party to the costs which he has incurred in enforcing his rights by action. A suitor therefore at the present day, in order to ascertain his right to costs in any particular case, might have to consult a statute of Edward I., one of Elizabeth, one of James I., one of George III., and half a dozen of Victoria. Well might the Common Law Commissioners say, "The "statutes which give to the parties a right to costs are in a very "confused and unsatisfactory state. Not only have the separate "enactments of the older statutes given rise to a variety of deci- "sions, but subsequent statutes have in some instances modi- "fied, and in others partially repealed, former enactments, so "that it is extremely difficult to ascertain what the real state of "the law is upon this subject. We are of opinion that these "statutes should be revised and consolidated (*b*)."

The mode in which the subject of costs is treated in the statute book is but a sample of the mode in which all other subjects are treated. A principle is laid down in the time of the Plantagenets, altered under the Tudors, varied under the Stuarts, and partially repealed, and then perhaps revived in a new shape under the House of Hanover. And the trained mind of the bench and bar is wasted and degraded in the semi-mechanical labour of putting into juxta-position for present use enactments historically separated by intervals of centuries.

The process by which such a state of things is to be remedied must be the grouping of all the statutes under certain heads, according to their subject-matter, and irrespectively of their

(*b*) Third Report, 1850, p. 7.

chronological order except as between the statutes grouped under the same head. Thus all the statutes relating to costs would be gathered out of the many volumes in which they are scattered, and confronted with one another in consecutive pages. The like would be done with the laws of marriage, master and servant, contracts of sale, and so on. This process is called *digesting*.

When, however, the statutes relating to any given subject were confronted with one another under one head, a vast amount of verbiage would at once be seen to be superfluous, and due merely to the fact that the statutes were when enacted separated from similar statutes by long stretches of years, which it was necessary to bridge over by tedious recitals, and frequent phrases of reference. These would be retrenched, and the various statutes, with all their various provisoes, relating to any one subject would be modelled into one consistent whole. This process is that generally known as *consolidation*. The next step would be a philosophical reconsideration of the principles upon which the statutes had been divided into groups, and such modification of this arrangement as should exhibit them in a really scientific order—the species under the genus, and the particular cases under the species. And this reconstruction, which might either precede or follow the last two processes, is fairly entitled to be called *codification*.

The processes already enumerated, by which the statute law might be at once reduced to at most one-fifth of its present bulk, and at the same time become coherent and intelligible—namely, sifting, expurgation, digesting, consolidation and codification—affect merely the form in which the law is made accessible, not the substance of its enactments. They could also be effected once for all. The legislature will, however, never consent to abstain for ever from any alteration of even the most perfect statute code, which, indeed, from the movement of human affairs, would speedily become worse than useless. Another process, therefore, remains to which it must be subjected, which will affect its substance as well as its form, and which will never cease to operate. This we may call *revision*. It is in fact the result of the change which every year's session of Parliament

will work in both the substance and the form of the law—not the enactments themselves, which every year pass the Houses of Lords and Commons and receive the Royal Assent, but the application of those enactments to the pre-existing statute code.

For, once having got our statute code into scientific shape, we must never allow it, by the accretions of new statutes arranged in the old chronological fashion, to fall into the old state of confusion. The uses and the interest of a merely chronological series of statutes are inestimable. Such a series, as Mr. Froude has pointed out and has demonstrated in practice, forms the most authentic skeleton of history. Any more magnificent national monument than the ten folio volumes published under the direction of the Record Commissioners, which exhibit with critical accuracy every statute passed from the time of King Henry III. to the death of Queen Anne, it is impossible to conceive. Domesday itself must yield the palm to so indisputable and continuous a panorama of the state of England during five centuries. But the uses of such a monument are historical rather than legal. The proceedings entered on the rolls of Parliament ought doubtless to be printed in full in chronological order, and every great library should have a copy of the "Statutes at Large." Scotch, Irish, Colonial, Local and Personal Acts should also doubtless be printed separately, and preserved and combined in such ways as shall make them most useful for the purpose for which they were severally enacted; and some of these combinations should certainly be effected by Government. But what is pre-eminently the duty of Government is to select from the mass of statutes those which form part of the true law of England, to arrange them in a code in the manner before specified, and to provide that the code thus constituted shall alone be quoted as binding statute law in courts of justice. The duty of Government in this respect will of course not cease with the formation of the code. The process of "Revision" would consist in incorporating year by year into the code such portions of the year's legislation as might deserve a place there. In order to effect this it would be necessary—

(1.) That Bills should be drawn upon a regular system, and always with reference to the part of the code which it might be

intended to alter. No patchwork or verbal changes, or repeals by vague inference, should be allowed; but every Bill should expressly repeal such and such a section of the code, and in its place substitute such and such a new section, or should enact that to such and such a chapter such and such new sections should be added.

(2.) That every ten years the code should be republished by Government, containing the new sections in their proper places, and omitting those which had been repealed.

(3.) That to carry out this double work of introducing proper Bills into Parliament, and of adapting the results of legislation to the code, a permanent commission should be appointed. When the nation becomes conscious of the importance of the duties which such a commission would discharge, it would endeavour to attract into it by high salaries, and possibly seats in the Privy Council, the ablest intellects of the day.

The lawyer would then possess in the code, we will say, of 1870, which would occupy perhaps five or six volumes, the whole statute law of England in force at that date. He would also, during the decade 1870—1880, have to purchase certain emendations on the code, which might be called by the old Roman word "Novels," the effect of which upon the code would be so obvious, that an ordinary clerk might be trusted to note them upon its margin. After the year 1880 the lawyer might either continue to use his old code, as varied by the Novels, or at a moderate outlay might buy the new code which would be published that year, and which thenceforth would alone be allowed to be quoted in court. It appears to us that this plan would be both simpler and more efficient than any which has hitherto been proposed.

For many plans have been proposed for remedying the present intolerable confusion.

King Edward VI. wrote, "I have showed my opinion here-
"tofore what statutes I think most necessary to be enacted this
"session; nevertheless I could wish, that beside them hereafter,
"when time shall serve, the superfluous and tedious statutes
"were brought into one sum together, and made more plain
"and short to the intent that men might better understand

" them; which thing shall much help to advance the profit of " the Commonwealth" (*c*).

In the reign of Queen Elizabeth Sir Nicholas Bacon drew up a scheme for reducing, ordering and printing the statutes of the realm, of which the heads were as follows:—" First, where " many lawes be made for one thing, the same are to be reduced " and established into one lawe, and the former to be abrogated. " Item, where there is but one lawe for one thing, that these " lawes are to remain in case as they be. Item, that all the " Actes be digested into titles and printed according to the " abridgment of the statutes. Item, where part of one Acte " standeth in force and another part abrogated, there shall be " no more printed but that that standeth in force. The doeing " of these things maie be committed to the persons hereunder " written, if it shall so please her Majestie and her Counsell, " and daye wolde be given to the committees until the first daie " of Michlemass Terme next coming for the doing of this, and " then they are to declare their doings, to be considered by such " persons as it shall please her Majestie to appoint" (*d*).

Several attempts at a reform of the Statute Book were made from time to time in accordance with these recommendations. Lord Bacon has left some remarks upon this subject which are worthy of their author. He had himself formed a design of digesting the laws, which he says he had relinquished " because " it is a work of assistance, and that I cannot master it by mine " own resources and pen" (*e*); but in the " De Augmentis " Scientiarum," he had laid down the method in which it ought to be done (*f*). " There are two ways," he says, " of making " a new statute. The one confirms and strengthens former " statutes on the same subject, and then makes a few additions " and alterations; the other repeals and cancels all former enact- " ments, and substitutes an entirely new and uniform law. The " last method is the best." (Aph. 53.) And he well describes the confusion which even then existed. " Since an express

(*c*) *Apud* Burnet's " History of the Reformation," ii. pt. ii. p. 14.
(*d*) MS. Harl. 249.
(*e*) Epist. dedic. to " An Holie War." Works (Stebbing), vii. p. 14.
(*f*) Book viii. app. 54—64. Works (Stebbing), v. p. 99.

" statute is not regularly abolished by disuse, it comes to pass " that through the contempt of obsolete laws, the authority of " the rest is somewhat impaired; and from this cause ensues a " torment like that of Mezentius, whereby the living laws are " stifled in the embraces of the dead." (Aph. 60.) The processes of amendment he enumerates as follows:—First, let obsolete laws be omitted; secondly, let the most approved *Antinomies* be received, the rest abolished; thirdly, let the *Homoionomies*, or laws which are of the same import, be abolished; fourthly, let such laws as determine nothing be dismissed; lastly, let those laws which are found to be wordy and too prolix be more compendiously abridged. (Aph. 60.) When this has been done, he says that it will be expedient that the old volumes shall still be preserved in libraries, for the illustrations of antiquity, though the ordinary and promiscuous use of them be prohibited. (Aph. 63.) And he will not allow the fact that the jurists who happen to be available at the time when reforms are projected are inferior to their predecessors, to be an argument against the reforms being undertaken. " It is an unfor- " tunate circumstance when, by the taste and judgment of a less " wise and less learned generation, the works of the ancients are " mutilated and reconstructed. But that is often necessary " which is not best." (Aph. 64.)

King James I., in a speech from the throne (1609), spoke of " divers cross and cuffing statutes, and some so penned that " they may be taken in divers, yea, contrary sences;" adding, " and therefore would I wish both those statutes and reports, as " well in the Parliament as common law, to be once maturely " reviewed and reconciled; and that not onely all contrarieties " should be scraped out of our bookes, but even that such penal " statutes as were made but for the use of the time (from breach " whereof no man can be free) which doe not now agree with " the condition of this our time, might likewise be left out of " our bookes, which under a tyrannous or avaricious king could " not be endured. And this reformation might (me thinkes) " bee made a worthy worke, and well deserves a Parliament to " be set of purpose for it." A commission was appointed in the following year, and a MS. in the British Museum is probably

the fruit of its labours (*g*). It contains a list of the statutes from 3 Edw. I. to 2 Jac. I. which had been repealed or had expired, and suggestions for further repeals and changes. The report was, however, never acted upon, and under the Commonwealth several commissions were appointed: "To revise all "former statutes and ordinances now in force, and consider as "well which are fit to be continued, altered or repealed, as how "the same may be reduced into a compendious way and exact "method, for the more ease and clear understanding of the "people" (*h*). Other commissions have followed in different reigns from that time to this, and the Houses have on several occasions resolved that something should be done in the matter, but nothing was actually done till those measures were originated which we are about briefly to describe.

In 1853 Mr. Bellenden Ker and four other gentlemen were instructed by Government to examine the statutes and report upon the best method of revising them. These gentlemen accordingly made three most valuable reports, which are printed among the parliamentary papers (*i*), and commenced to classify and register the statutes. Their labours were, however, superseded by the appointment, in 1854, of the "Statute Law Con-"solidation Commission." It was appointed by Lord Chancellor Cranworth, and consisted of about thirty members, most of them high legal dignitaries, who of course could spare little time for theoretical jurisprudence. Mr. Ker was, however, a member, and the Commissioners appointed several gentlemen, including those who had acted before with Mr. Ker, to carry out under their direction the work which had already been commenced.

The commission made four reports (*k*), which, with the three reports previously mentioned, contain a vast amount of curious information, carefully arranged tables of repealed or obsolete statutes, and specimen bills drawn experimentally upon a variety of subjects upon various principles.

(*g*) Harl. 244.
(*h*) Commons Journal, vi. 427.
(*i*) 1854, vol. xxiv. pp. 154, 363, 407.
(*k*) Parl. Papers, 1855, xv. 829; 1856, xviii. 861; 1857, xxi. 203: sess. 2, xxi. 211; 1859, sess. 2, xiii. pt. 1, 1.

The reports speak very highly of the law itself, when clearly ascertained, but add, "we find that a rule, established and defined by centuries of experiment and discussion, and perhaps elaborated with perfect self-consistency, is registered in disorderly and cumbrous fragments in a score of statutes and a hundred reported cases." Mr. Coode contributes a philosophical system of legal classification, starting from the two ideas of "interest" and "force."

In the third report of the Commissioners the following classification of the statutes is suggested:—

I. Armed Forces.
II. Revenue.
III. Finance.
IV. United Kingdom.
V. Great Britain.
VI. England and Ireland.
VII. England.
VIII. Scotland.
IX. Ireland.
X. Local and special.
(*a*) Crown lands.
(*b*) Scotland.
(*c*) Ireland.
(*d*) Miscellaneous.
XI. Colonies.
XII. East Indies.
XIII. Slave Trade.

It is obvious, however, that the arrangement is not guided by the only logical principle upon which a satisfactory classification can be made—that of "excluded middle." A scientific distribution of the statutes has yet to be made. The same report states that of the public general Acts passed in the present reign, more than one-fourth are not now in force, while the Acts which affect England (iv., v., vi. and vii. in the above classification) form little more than one-third of the residue. The proportionable bulk of repealed Acts is, of course, much larger in the earlier reigns.

The statutes passed during the present century occupy several more volumes than all the previous statutes from Magna Charta downwards. Those affecting England passed between 1800 and 1858 amount to 1,836.

The commission presented its fourth report in 1859, and Lord Chancellor Campbell declined further to prolong its existence. It had accumulated a considerable store of materials, but a slight expurgation Act (*l*), and the Criminal Law Con-

(*l*) 19 & 20 Vict. c. 64.

solidation Acts were the only immediate result of its labours. From this point Lord Westbury becomes the prominent figure in law reform.

In 1860, as Attorney-General, he announced that, with the approbation of the Government, he had engaged two gentlemen to index the obsolete Acts. He intended to expurgate the Statute Book of all Acts which, though not expressly repealed, were not actually in force, and proposed to work backwards from the present time. When the expurgation was accomplished an edition of the actually living law would be published, arranged under appropriate heads (*m*). The gentlemen thus employed, Mr. Reilly and Mr. Wood, have been ever since carrying on the work of their predecessors before and under the commission; and with such activity did they enter upon their duties that in the following session a bill became law (24 & 25 Vict. c. 101), which relieved the Statute Book of 900 obsolete Acts, passed between the eleventh year of George III. and the sixteenth and seventeenth of Victoria, and scattered up and down through twenty-nine quarto volumes.

In 1863 Lord Chancellor Westbury introduced a second expurgatory bill, in a great speech in which he reviewed the whole subject (*n*). He proposed not only to revise the Statute Book, but also to make a digest of the rules of the common law which are now buried in 1,200 volumes of reports. The first step would be to expurgate the statutes of dead law, the next to classify them under appropriate heads, next to add under each head the corresponding head of the digested reports, so forming a *digest* of the whole English law. The time for a *code* will not arrive, said the Lord Chancellor, till the distinction between common law and equity has vanished, and till we have trained up a generation of jurists competent to do the work. He intended some day to ask for a "Department of Justice." The bill thus introduced became law (26 & 27 Vict. c. 125), and expurgated the Statute Book from 20 Hen. III. to 1 Jac. II.

A bill carrying the same process through the period between

(*m*) Hansard, vol. 156, 1288.
(*n*) Hansard, vol. 171, 776.

1 Will. & M. and 10 George III., which was introduced during the present session, will complete the preliminary work of expurgation (*o*). All Acts virtually repealed, from Magna Charta to the seventeenth year of the present reign, will thus stand repealed in express terms, and all Acts heretofore repealed in express terms have been already registered and indexed by Messrs. Wood and Reilly and their predecessors. What should be the next step? In our opinion the residuum of living general statutes affecting England should be at once authoritatively published, arranged in the order of their enactment. The Government plan, so far as it can be gathered, seems rather to be to defer publication till the statutes have been digested under their appropriate heads. But this would surely be a mistake. Unless the Government officials have gone much further than there is any reason to believe in the preparation of a philosophical scheme for the arrangement of the statutes, and unless such schemes as they may have prepared are much more philosophical than that which was proposed by the late commission in their third report, it will be some years before the process of digesting can be satisfactorily accomplished. Let us have in the meantime an authentic collection of the living law of England in five or six manageable volumes. Such a collection would be the result of the processes which we have called *sifting*, which gets rid of all statutes which are not, properly speaking, "public general statutes of the realm," and *expurgation*, which gets rid of obsolete laws by express repeal, and then omits from the Statute Book every Act which has been expressly repealed.

These are, it is true, but two out of the five stages which must eventually be travelled, but it is nevertheless convenient to break the journey at this point. The remaining stages, *digesting*, *consolidation*, *codification*, demand a different and a less mechanical sort of labour. To exhibit in print every

(*o*) This bill, with many others, has been withdrawn, in consequence of the prolonged discussions upon topics of another nature which have engrossed the attention of Parliament. Lord Cranworth, however, has informed the House of Lords that it will be re-introduced by Lord Westbury, who has consented to resume his labours as a reformer of the law. [See now p. 54, *supra*.]

syllable of law which has not been repealed will be now, thanks to the indices and registers which have been constructed under the direction of Government, a purely mechanical task. It is, therefore, one which, if a sufficient number of hands are employed upon it, might well be accomplished within a few months from the passing of the third and last expurgatory Bill. How great a boon such a publication would be, both to the profession and to suitors, it is hardly necessary to say. With these volumes upon our shelves we could well afford to wait, say till the end of the year 1870, for a complete statute code.

Four years, if not wasted, would give ample time for consulting jurists and logicians—for all jurists are not logicians (*p*)—upon the distribution of the various heads under which the laws should be digested, consolidated, and codified. The best plan would probably be to invite all persons interested in the subject to send in their respective plans to a commission which should be appointed specially to consider the question, and which, in addition to its legal members, should contain a few such men as Mr. Mill and Mr. Mansell. The work to be ultimately published we have called a "Statute Code." And we conceive the term to be strictly applicable. The Roman "Code" consisted, in fact, exclusively of what we should have called statute law, while the common law was embodied in the "Digest." That the time has not yet arrived for a final code, in the French or modern sense, in which the distinction between common law and statute law, with many other distinctions, would no longer exist, we are, with Lord Westbury, quite prepared to admit. That the common law can for many years assume any other form than a digest of cases, we very much doubt. It is most gratifying to see that Government seems inclined to undertake the Herculean task of reducing the 1,200 volumes of reports to such a digest; but this work ought not for a moment to interfere with the far easier and equally pressing task of moulding

(*p*) This remark is painfully true even of the writers of the best text-books in practice: and, in the domain of theory, even the lectures of Mr. Austin are defaced by several cross-divisions, which are, however, obviously due to the fragmentary manner in which the views of that singularly accurate thinker have been presented to the world.

the statute law into what, as far as it goes, ought to be a real code. This is quite within the power of the Government, and this we have a right to demand.

Under the present system there are sixteen or seventeen Acts which tell one how to get married (*q*): a few years ago an Act of Parliament was solemnly passed (21 & 22 Vict. c. 26), to repeal the 6 Anne, c. 5; 33 Geo. 2, c. 20, and part of 39 & 40 Geo. 3, all of which had been repealed by 1 & 2 Vict. c. 48; and in 1842 the Court of Queen's Bench considered minutely the 2 & 3 Edw. 6, c. 24, which had been repealed fourteen years previously. And yet every Englishman is presumed to know the laws of his country.

Leaving therefore out of consideration the question of a digest of the common law, itself a subject of vast magnitude; leaving also out of consideration the question of the ultimate unification of statute law and common law in a symmetrical code, a subject of still wider magnitude; we would insist on the importance and practicability of producing a perfect and elastic code of the statutes. This is to be accomplished by six processes. To the first of these, "expurgation," the statutes have been already subjected, and we are of opinion that the result should be immediately given to the public in the shape of half a dozen volumes, containing all the living statute law which affects the realm of England. Such a collection must undergo the four further processes of "sifting," "digesting," "consolidation," and "codification," before it will be a real code. These processes might well be accomplished, and the final result published, by the end of the year 1870.

One more process remains by which ths Statute Code is to be modified to meet the wants of the age; this we have called "revision," by which we mean the method by which each year's legislation is to be fitted to its place in the code, and by which the code thus modified is every ten years to be republished by authority. We have also explained that "Revision" could not properly be carried out without a regularly constituted Government Department of Justice.

(*q*) So said Vice-Chancellor Wood at the Social Science Congress, 1859.

V.

The Statute Book for 1866.

(*From the Law Magazine and Law Review, or Quarterly Journal of Jurisprudence, No. XLIV., February*, 1867.)

THE STATUTE BOOK FOR 1866 (*a*).

THE late Session of Parliament, many as were the measures of practical utility which it sacrificed to party conflict, managed, nevertheless, to mature and add to the Statute Book 122 public general acts, filling 1,007 handsome octavo pages. The result of each year's legislation is interesting from several points of view. It presents us, in the first place, with an accurate, though colourless, picture of the past year; a *résumé* of the topics which month by month engaged the thoughts of various sections of society. The 40 or 50 volumes of the statutes of the realm are thus a wonderful panorama of the history of England, and the volume just issued is no less picturesque in this respect than its predecessors. As we turn its pages, the events of the past twelvemonth live again in our memories. The Jamaica revolt, and the cattle plague; Fenianism, and the marriages of the royal family; the cholera, and the financial crisis, are marshalled before us with impartial clearness. The progress of culture and refinement may be inferred from enactments relating to education, libraries, and picture galleries. The growth of faith in the resources of science is marked by various ordinances bearing upon the public health, and the spread of religious toleration by the abolition of vexatious oaths and declarations.

This may be called the historical aspect of a volume of the statutes. But it is no less interesting from the point of view of the social reformer, who will test it by its capacity of making the nation happier, or of the special pleader, who will criticise it as a work of art, to be honoured or despised, as its diction is terse or slovenly. By the theoretical jurist it will be regarded

(*a*) *Law Magazine and Review*, No. 44, Feb. 1867.

as a specimen of the form and method in and by which English laws are passed and promulgated; and it is from this point of view that an estimate of the legislative results of the late session will be attempted in the following pages.

The volume, as already stated, contains 122 statutes, which are all supposed to be of a "public general" nature.

There were also passed in the same session 363 "public, "local and personal," and 14 avowedly "private" Acts, but with neither of these classes have we any present concern; nor, indeed, are they ever purchased or consulted by the professional lawyer, except for their bearing upon a specific case. It is sufficiently hard upon him that, in addition to all the new judge-made law, which, as every one knows, accumulates with alarming rapidity, and fills every year many bulky volumes, he should be compelled each autumn to master about 1,000 pages of brand-new "public general" Acts of Parliament.

The task is in some respects even harder, in others less hard, than might at first be supposed. Harder, because the enactments are put forth in a disorder that must be seen to be appreciated; less hard, because a very large number of the Acts are of such a character, that the ordinary English lawyer never troubles himself about them.

The fact is that the Statute Book exhibits two of the most pernicious faults which can possibly affect a body of laws; First, it contains a mass of irrelevant and alien matter, intermingled in well-nigh hopeless confusion with what is useful; secondly, the useful matter is arranged in a merely chronological, instead of a scientific, order.

The volume for 1866 amply bears out both those assertions.

And first, as to the heterogeneous nature of its contents. It aims at being a Statute Book, not only for England, to which most of its Acts apply exclusively, but also for Ireland, Scotland, India and our colonial empire, so far at least as the last two are legislated for by the imperial government; and it contains a vast number of Acts which, from their limited operation in time or place, are widely distinguishable from true general laws. It has cost us some trouble to put together, as it were, in five separate heaps, the very different sorts of enactments

which are scattered in positions the most incongruous throughout the volume. These five heaps, or classes, are as follows:—

I. Non-English Statutes, of which 17 relate to Ireland, 9 to Scotland, 5 to the Colonies, 1 to India, 1 to Courts of Justice in foreign lands. Total 33, not one of which has any reference to the realm of England.

II. Local and Personal Acts which have reference only to definite localities or definite individuals in England, and appear among the so-called "public general" statutes, not because they are really of a "general" nature, but because they were for certain reasons introduced into Parliament at the public expense. Of these there are 18.

III. Annual Acts, by which the machine of Government is carried on for the current year: of these 3 relate to supply, 3 to discipline in the army and navy respectively, 1 to indemnity granted to persons who may not have taken certain obsolete oaths, 2 to the continuance of expiring Acts (*a*); in all 9.

IV. Legislative Warrants: by which the Government is authorized to apply certain monies for certain purposes, to vary the arrangement of the public funds, or to carry out certain public works; in all 8.

V. True General Laws for England, 54.

It appears, therefore, that considerably more than half the total number of the new statutes are either inapplicable to England, or deficient in the characteristics of true general laws. Of the 122, 68 belong to classes I., II., III. or IV., leaving for class V. a residuum of only 54 true English statutes.

And the spurious are not only more numerous, but occupy relatively much more space than the genuine statutes. Out of the 1,007 pages, the genuine statutes occupy only 336. Now, as long as England is at the head of a great colonial empire, and as long as Ireland and Scotland retain their national peculiarities, so long must every year produce Acts of Parliament whose operation is purely colonial, purely Irish, or purely Scotch. Such Acts must of course be made conveniently accessible to those whom they concern; but why should the

(*a*) The proper classification of such Acts may be disputed.

law of England (or rather of the United Kingdom) be encumbered with fragments of other systems? Why should laws for England be jumbled up with laws which have no operation except at the antipodes? The very first step towards a reform of the law is to separate English statutes from these half-foreign accretions.

The next step is to separate general laws from laws not general. It happens to be expedient every year to pass certain essentially private Acts at the public expense; it happens to be necessary that the nation each year should give to its rulers certain powers, to be renewed from year to year, and should occasionally give authority to those rulers to do acts otherwise illegal; but there is no reason why all these Private Acts, Annual Acts, and Acts in the nature of legislative warrants, should be for ever embalmed among the statutes of the realm. An instance or two may make this clearer.

Mr. Forsyth was elected member of Parliament, and took his seat accordingly, while holding a certain office under the Crown. It was afterwards discovered that he had thus become liable to pains and penalties, and the sole object of c. 20 in the Statute Book of 1866 is to protect him against them. It is in fact an indemnity, which Mr. Forsyth can carry in his pocket, and plead if he should be molested by a common informer, but is of very little use for any other purpose.

It is necessary that certain orders, made under the "Local "Government Act, 1858," by the Home Secretary, for the improvement of various localities, should be approved by Parliament. Chapters 24, 79, 106 and 107 of this volume are accordingly devoted to the confirmation of such orders, which are set out in full, with elaborate schedules immortalising all sorts of obscure parochial details. These four Acts occupy 112 pages (*b*).

But if the 54 true English laws were presented to the lawyer disencumbered of the 68 enactments which are either not English, or not general laws at all, he would still have a further

(*b*) [On the unsatisfactory way in which these Acts have been subsequently dealt with, *vide infra*, pp. 145, 163.]

and even graver cause for complaint, arising out of what we said was the second great fault of the Statute Book. He would find his residuum of 54 true English statutes arranged on no imaginable plan. Their arrangement is, in fact, determined merely by the order in which they received royal assent, and if they have thus no organic connection one with another, it is needless to say that they have no such connection with the [redacted] the previous volumes of the

contents of these 54 statutes
f the subjects of which they
ntific method:—
rize Money; c. 60, Patriotic

vings Banks; c. 109, Disci-

c. 34, Assurance), 4.
leeds), 1.
eases; c. 111, Ecclesiastical

108, Railway Securities), 2.
Divorce; c. 68, Pensions;

ts), 1.
e of Man; c. 36, re-arrange-

vestments; c. 25, Exchequer
t), 3.

ies; c. 41, Nuisances; c. 90,

Libraries (c. 114), 1.
Loans, Government (cc. 28, 72, 73, 95), 4.
Local Government (c. 78, County Rates), 1.
Metropolis and Thames (c. 31, Vestries; c. 89, Rivers; c. 122, Commons), 3.

Offices, Public (c. 76, Fees by Stamps), 1.
Office (c. 22, Abolition of Declarations as Qualification for), 1.
Parliament (c. 19, Oaths Abolition; c. 54, Revising Barristers; c. 55, Postmaster-General), 3.
Poor (c. 113), 1.
Prisons (c. 100), 1.
Procedure, Criminal (c. 52, Expenses of Prosecutions; c. 121, Extradition), 2.
Safety, Public (c. 69, Dangerous Goods), 1.
Schools, Industrial (c. 118), 1.
Schools, Reformatory (c. 117), 1.
Trade (c. 37, Hops; c. 65, Colonial Coins; c. 82, Standard Weights and Measures), 3.

An inspection of the above list will show how Acts which we have grouped together, as having some affinity for one another, under one title, are sundered by wide intervals in the actual arrangement of the statute book. Thus, the Acts relating to government loans are numbered in the statute book 28, 72, 73 and 95. Even such a rough and *primâ facie* classification as that which we have here attempted would be infinitely preferable to the merely chronological arrangement which prevails at present. A Statute Book for 1866, omitting the non-English and non-general statutes and arranged upon almost any principle of natural grouping, would occupy a third of the bulk, cost a third of the price and be of ten times the utility, of the volume which has actually appeared.

No slight advantage, resulting from the introduction of any sort of order into the arrangement of the statutes, would be that the legislature would be obliged to be more careful to confine each measure within the bounds of its proper subject-matter. Hybrid Acts, such as chapter 105 of the late session, would no longer pass muster. The main object of this Act was to keep alive a number of private turnpike Acts, which would have otherwise speedily expired. It is so far a mere continuance Act, and as such we have classed it. But its 2nd section amends the General Turnpike Act (4 Geo. 4, c. 95), and is therefore a true public general enactment, which ought never

to have been introduced into what is, by its own confession, "The Annual Turnpike Acts Continuance Act, 1866."

What, again, can be more clumsy in form than the Sanitary Act (c. 90) of the late session? It is divided into three parts. The first of these amends the Sewage Act, and its 11th section incorporates, and is unintelligible without reference to various sections in the Public Health Act of 1848 and the Local Government Acts of 1858 and 1861. The second part amends various Acts relating to nuisances. The third part contains miscellaneous provisions in a state of hopeless confusion; while the fourth part contains a most complicated system of exceptions and modifications to be observed in applying the Act to Ireland. It is obvious that a separate Act should have been drawn, which should have affected Ireland directly, not by ambiguous inference from an English statute. The English statute itself contains heterogeneous material, which should have been digested under very numerous heads.

We have pointed out several instances afforded by the new volume of the vicious system upon which the laws of England are composed and promulgated. It is but fair to point out such indications as it presents of a movement towards a better state of things.

In the first place, the system of "short titles" has been, for the first time, very extensively applied. Almost every Act contains a section by which it christens itself by a terse and appropriate name; and, thus christened, may be cited by its self-imposed name as effectually as by the old cumbrous method. "The Cattle Assurance Act, 1866," is in every way more convenient for citation than its equivalent, "An Act passed in the "twenty-ninth year of Her Majesty Queen Victoria, chapter "thirty-four."

Indeed, the Foreign Jurisdiction Act goes so far as to christen all previous Acts upon the same subject by its own name, with the addition of the year in which they were respectively passed.

Another hopeful sign is the increase of consolidation Acts, which gather up all the legislation upon a given subject into one orderly statute and repeal all the previous enactments. In the volume before us, the laws relating to exchequer bills, to

the conservancy of the Thames, to the discipline of the navy, and to industrial and reformatory schools, are thus gathered into separate statutes, while a long list of fragmentary enactments scattered throughout the statute book are at the same time repealed.

But this system should be much more thoroughly carried out. Instead of the amending Acts which now produce so much confusion, entirely new statutes should be drawn, which should embody the whole of the old law upon each subject, so far as it is to be preserved, in addition to the new law which it is proposed to introduce. Old and new should be arranged upon a symmetrical plan together, and all old statutes upon the subject thus remodelled should be at once repealed.

But such changes as these are but palliations of evils which ought to be entirely swept away. The faults which we have indicated in the Statute Book for 1866, are of course equally present in every one of its predecessors, and the whole bulk of the statute law needs those remedies, the necessity for which has been shown in the case of the volume before us.

The fault of heterogeneousness must be cured by a process of sifting, which shall reject from the English statute book all statutes which do not affect England, or which are not really of a "general" character. The fault of mere chronological arrangement must be cured by codification—a word of awful import to old-fashioned lawyers, but which means nothing more than the exhibition of our old law in a rational instead of an irrational order.

These are, it is true, faults in the form, not in the matter of the law; but they are not, therefore, unimportant. To defective form, are attributable the obscurity and delay of all legal proceedings, the ignorance of the lawyer of every department of the profession but his own, and the difficulty experienced by the legislature in rightly carrying out such changes in the matter of the laws as may be found to be necessary.

Hitherto "law reform" has always meant some change in the matter of the law which is thought to be desirable. We are beginning at length to see that before we can change our laws successfully, we must ascertain clearly what they are. A Royal

Commission has just been issued containing a list of names well calculated to make us hopeful of the result of their labours; above all that of Lord Westbury, to whom, more than to any one else, we owe it that this great work is being at length seriously taken in hand.

The various law reforms, some of which, at least, the present generation may hope to see accomplished, will probably occur in the following order:—codification of the statutes, digest of the cases, unification of the statute code and case code, identification of law and equity. But the first question with which the Royal Commission will have to deal will be undoubtedly that of the codification of the statutes. We state what appear to be the questions upon which the commission will at once be called upon to come to a conclusion. They are:—

I. Shall the statute code embrace only the laws affecting England, or shall it also contain Irish, Colonial, Scotch, and Indian Acts?

II. Shall it contain only true general laws, or also what we have grouped under the heads "local and personal," "annual," and "legislative warrants?"

No one who has read this paper will doubt what answers would be given by us to these two questions.

III. Shall the matter of the statutes be changed, where it is thought to require change, at the same time with their form?

In favour of such a simultaneous change, it may be urged that the opportunity is a good one for getting rid of anomalies, which will now, for the first time, be visible in all their deformity.

Against it may be said, that a change of matter is no necessary accompaniment of a change of form; that, on the contrary, the two kinds of change will require quite different agencies to carry them out, and that the full discussion which

each change in the matter of the laws must undergo in Parliament, will delay, for an indefinite period, those changes in their form which might otherwise be sanctioned as a matter of course.

IV. What scheme of legal classification would be at once the most convenient and the most scientific?

This is, perhaps, the most difficult question of all, and is certainly one which we shall not attempt to answer in the few words which must bring this paper to a close.

VI.

A New Edition of the Statute Book.

(*From the Saturday Review, 20th July*, 1867.)

A NEW EDITION OF THE STATUTE BOOK (a).

A BILL repealing wholly or in part, some 1,300 Acts of Parliament has just passed swiftly, and almost without remark, through both Houses, and received the Royal Assent on Monday last. Such a fact as this is, to the lawyer of the old school, nothing less than a terrible portent. It is true, he says, that all these condemned Acts are alleged to be obsolete; but is this really the case, and how is one to be sure of it? A single stone can hardly be displaced in the complicated structure of English law, without dislocating some portion of it which we would willingly leave untouched. It is still less likely, he argues, that 1,300 blocks can in one operation be pulled out from different parts of the building, without causing its utter ruin; which indeed becomes a certainty when we remember that the operation just performed is but the last of a series, the effect of which has been to withdraw more than 3,000 pieces from the fabric of our jurisprudence. To the majority, however, of the legal profession, and probably to all persons who take the trouble to reflect upon the matter, this operation is one of the greatest legal reforms which have ever been effected in England; and, being strongly of this way of thinking ourselves, we propose to state briefly what it is that has just been accomplished, and in what manner the results thus obtained may be turned to the best advantage.

Acts of Parliament are at present classed practically under two heads—1. "Public general;" 2. "Public, local and personal, and Private." The first are what are generally known as "the statutes," and occupy usually from forty-five to eighty-

(a) *Saturday Review*, 20th July, 1867.

five volumes, according to the size and completeness of the edition. The second kind extend to about 400 folio volumes, and are to be found in a collected form only in very large public libraries. The distinction between the two classes of statutes is entirely arbitrary, depending merely upon the fact that those composing Class I. were introduced into Parliament at the public expense, and those in Class II. at the expense of private persons or bodies. It happens, however, that this merely arbitrary distinction coincides, though not very accurately, with one that is most essential. While Class II., with very few exceptions, contains only statutes which alter the rights of definite individuals, Class I. comprises nearly all those which affect the whole population, and thus deserve a place in a general body of law.

It is not very important that acts of the second class should be arranged in any sort of order, or should be made easily accessible as a whole. The general public is no more concerned with them than with the title-deeds of individual proprietors, or the charters of particular corporations, which are in many respects very similar in their nature to private Acts of Parliament. It is enough if each person has in his own possession such documents of this nature as may affect himself, and can produce them whenever it may be necessary. It is far otherwise with the so-called "public general" statutes which are comprised in Class I. They contain rules with which it is as necessary that every citizen should be acquainted as with the maxims of the common law. It is therefore highly desirable that these statutes should be well arranged and clearly expressed, that such of them as are repealed should be easily distinguishable from such as remain in force, and that they should be published in as cheap and convenient a form as possible; and this not only that the people at large may have a chance of acquiring some acquaintance with the laws which they are expected to know and to obey, but also that the legislature may be enabled to discover readily what is the actual state of things which it is from time to time called upon to alter or amend.

Now it is well known that the existing collections of so-called public general statutes are as far as possible from fulfilling these

requirements. In the first place, the volumes in which they are contained preserve dead law as well as living. Acts long ago repealed are in no way distinguishable from those which are in full force, and many which are wholly inapplicable to the present state of society are, or rather were but a few weeks since, still nominally operative. To these causes is mainly due the intolerable bulk of our statute book. Indeed their mischievous effect was perceived even as early as the time of Edward VI., who says that he could wish that, when time should serve, "the superfluous and tedious statutes were brought into one sum together, and made more plain and short, to the intent that men might better understand them." The evil became, however, far more serious in later times, as may be readily inferred from the fact that in an edition of the statutes from Henry III. to 21 & 22 Victoria, in forty-one volumes, no less than twenty-three volumes are filled with acts passed subsequently to the union; and of the 6,887 Acts comprised in these twenty-three volumes, 3,523 are no longer in operation.

Measures have, however, at length been taken to remedy this state of things. Lord Cranworth, in 1854, obtained the appointment of the Statute Law Commission, under whose direction a careful register was made of all repealed statutes; but this register left untouched a vast number of acts which, though unrepealed, were practically obsolete. That these have been carefully catalogued and then expressly repealed is due to Lord Westbury. In 1860, as attorney-general, he announced that Mr. Reilly and Mr. Wood had been engaged to carry out the work, and their labours have resulted in three "Expurgation Acts," as they are called, by which, as before mentioned, about 3,000 obsolete enactments have been swept out of the statute book. Lord Westbury, in introducing the measure, stated that it was undertaken with a view to a revised and greatly abbreviated edition of the statutes; and Lord Chelmsford has accordingly, in moving the second reading of the final expurgation act, announced that such an edition may be expected at no very distant date. It is to be comprised in six or seven volumes, and is to be accompanied by a complete classified index. The subsequent annual volumes of the statutes are to be provided with similar

indices. Such an edition would no doubt prove a very great boon both to the profession and to the public. It would contain all the living statute law, weeded of all that is obsolete and dead, and would certainly not extend beyond ten volumes. The proposed indices would also be of the greatest service. But when we have said this, we have said all that can be said of the superiority of the new edition over those which now exist. The new edition will contain no dead law, and will be comprised in a comparatively small compass; but still greater improvements are within our reach.

In the first place, the present would be a favourable opportunity for the adoption of a more rational system of classifying the statutes than that which now prevails. The cardinal distinction ought evidently to be between those which impose general rules of conduct, and those which only affect the rights of definite individuals. These classes should be called "public" and "private" respectively, and the accidental circumstance of the mode in which acts are introduced into Parliament should no longer be allowed to determine the class to which they are to be assigned. To the "private" class should be relegated all those acts which, though really of a "local and personal" character, are now, because they happen to be passed at the public expense, classed as "public general." How little they answer to such a description will appear from a few instances culled from the so-called public general statutes of last Session. One of these exempts Mr. Forsyth from such penal consequences as he may have incurred by sitting as a member of Parliament while holding a certain place of profit under the Crown. Several others confirm, and embody at great length, certain provisional orders, such as an order of the Home Secretary enabling the West Hove Improvement Commissioners, acting under their private act, to effect minute improvements in the streets of that pleasant suburb of Brighton (*b*). After this rectification of frontier between the "public" and "private" statutes, it would be desirable that the two collections should be issued, as usual, every

(*b*) [These Acts have since been assigned to a different position, but the change is by no means for the better; *vide infra*, pp. 145, 163, 164. For the author's final views as to the classification of the Statutes, *vide infra*, pp. 146, 161.]

year; but the statute book about to be published by Government, should be far from comprising all even of the statutes which are distinctly of a public character. Two kinds of really public acts are passed every year which are quite unsuited for a place in a permanent body of law—namely, those which are of annual recurrence, such as the Mutiny and Supply Acts, and those which are passed for a definite purpose, and whose operation is exhausted when that purpose is accomplished, such as acts to dower a princess, or to enable the Government to build a new National Gallery. If all the acts to which we have objected as unsuitable were omitted from the revised edition, it would contain none but true general laws; but it would still contain many laws which are of little use to the English lawyer, because they operate exclusively in India, the Colonies, Ireland, or Scotland. What is required is not one collection of the heterogeneous laws by which these widely different localities are governed, but distinct collections of the statutes affecting the various kingdoms and dependencies which are subject to the British Crown. Perhaps the most convenient arrangement would be the following:—The first, and most important, collection would contain only statutes operative in England; the second, only those operative in Scotland; the third, those operative in Ireland; while the fourth would contain all those which relate to India, the Colonies, and the slave trade.

To sum up what has been advanced, the annual volumes of statutes should for the future be distinguished as public and private; and the line between the two classes should be drawn in accordance with a logical principle. The revised edition about to be issued by the Government should be relieved, not only, as is already proposed, of all dead laws, but also of all which are not really of a general nature, and of all which, from their limited effect, may be described as "annual acts," or as mere "legislative warrants." The residuum should be divided into four separate works, which might be distinguished as the "English," the "Scotch," the "Irish," and the "Imperial" statutes respectively. An edition compiled upon these principles would be much less bulky and much more convenient than that announced by the Government; nor need it occupy

more than two or three months longer in preparation. Such an edition would also be a step in the direction of a statute code; into which statute law, expressed as it already is in distinct propositions, might be with very little difficulty converted, without waiting for the application of a similar process to the common law. For the first step towards such a code must be the selection of such statutes as are fitted for a place in it—in other words, statutes which are not only still in force, but are also of a really general and permanent character.

The scheme of the Government is apparently to arrange the new edition in a merely chronological order; and this would probably, in the first instance, be the best plan. Much time would, at any rate, be lost if the measure were now delayed till a really philosophical system of arrangement had been devised, and till the acts and fragments of acts had been distributed according to such a system. What the profession and the public require, and what they ought to have in their hands a year hence, is a perfectly complete edition, in about three volumes, of all the general and permanent statutes operative in England which are now in force.

*** The following statement drawn up in 1867, with reference to the Statutes of that year, may be worth preserving :—

"This volume contains no less than 146 so-called 'public general' Acts, occupying 1,483 pages. Of these Acts, 26 are purely Irish, 15 Scotch, 4 Indian or colonial. Of the Acts which affect England, 11 are really of a private nature, 21 are annual enactments for carrying on the machine of government, 9 are mere warrants to the executive to do certain things, and 1 is a wholesale repealing Act; in all, 42 Acts are not of a really general character. If these non-English and non-general Statutes were omitted, the volume for the current year would contain only 59 Acts, and its 1,483 pages would be cut down to 270."

VII.

The Statute Book.

(*From the Saturday Review, 6th February*, 1869.)

THE STATUTE BOOK. (a)

THE approach of another session is suggestive of the inevitable annual volume of new acts of Parliament. It may also suggest to a few discontented spirits an inquiry whether it is absolutely necessary that each volume of the statutes should be as cumbrous as its predecessor, and each year's legislation as unscientific as that of the year before. We pointed out some time ago (*b*) what appeared to us to be very important defects in the way in which the statutes are promulgated, and we made certain suggestions for the re-classification, not only of the annual issue of acts of Parliament, but also of the long-promised new edition of all such acts as are now in force. The new edition, which, with the appliances now at the disposal of Government, in the shape of repealing acts and registers of repealed acts, might easily have been published a year ago, is not as yet even announced. So that the lawyer who wishes to have at hand all the living statute law, which certainly need not occupy more than eight or ten volumes, is compelled to purchase a library of from fifty to one hundred and fifty volumes, according to the edition which he may choose. The annual issue of the statutes still labours under almost all the defects which we indicated in our former article. The volume for last session is indeed somewhat less bulky than its predecessor. Twenty-two acts of the kind which, as we pointed out, have no claim to be called "public general," have been omitted from the authorized edition of such acts; but the change has obviously been made merely as a rough and ready mode of lightening the book, and has been

(*a*) *Saturday Review*, 6th February, 1869.
(*b*) *Supra*, p. 137.

guided by no clear conception of the principle upon which such a change should be founded. The very first qualification of an editor of the statutes should be the possession of a definition of the term "public general." Such a definition we believe to be totally wanting to the minds of those now in authority. In their use of the word "public," they evidently waver between three different senses—namely, law passed for state purposes, law to be judicially noticed, and law passed at the public expense; while to the word "general" they attach no meaning whatever. Many acts habitually included in previous volumes of the public general statutes are, as we explained before, only private acts, called "public" in order to simplify the process of passing them. A number of these have accordingly at length been degraded from their usurped position, but many others have been left untouched. If "An Act for confirming certain Provisional "Orders made by the Board of Trade under the General Pier "and Harbour Act, 1861, relating to Carlingford Lough, "Elgin, &c. &c." is no longer to be called "public general," why should not the same justice be meted out to "An Act for "declaring valid certain Orders of her Majesty in Council "relating to the Ecclesiastical Commissioners for England and "to the Deans and Chapters of certain Churches?" The long and short of the matter is, that it is impossible to re-classify the statutes to any good purpose without first clearly determining upon what principle the operation is to be conducted.

The grand division of statutes should be into "public" and "private." "Public statutes" should be such as are passed for state objects, and therefore at the expense of the nation. "Private statutes" should be such as, being passed for the advantage of private persons, are paid for by their promoters. The latter class would comprise all the acts now known as "local and personal," as well as those specifically called "private." These should be printed and published just as they now are. The former class would correspond to those now called "public general." They should be printed and published rather as an historical monument than as a body of law. For legal purposes they would be subdivided into "general" and "special." The "public special" acts would comprise those

the operation of which is restricted to a definite time, place, person or object—namely, annual acts; acts which, though passed for state purposes, relate merely to local or personal rights; and acts which are merely legislative authority for doing a certain work. The "public general" acts would not only be passed for state purposes, but would also be true laws; and with these alone would the lawyer be concerned. But even this collection should be split up into four separately numbered series, containing respectively laws operative only in England, in Scotland, in Ireland, and in the colonies or India. The ordinary English lawyer would of course need only the "English series" of the "public general" statutes. The advantages of the proposed arrangement over that now in use will at once appear from an analysis of the volume of so-called "public general statutes" of last session. This volume, with which every lawyer is obliged to encumber himself if he would have any authorized statement of the legislation of the year, contains 130 acts, occupying 1,150 pages. Only 320, however, of these pages are occupied by true laws having any operation in England; 358 pages are occupied by Scotch, 121 by Irish, and 11 by colonial acts, of a public general character. Of the "public special" acts, as we would call them, the "annual acts" occupy 209 pages, the "legislative warrants" 66, and the "local and personal" 104. Instead of having to purchase a volume of 1,150 pages, the English lawyer would, under the arrangement proposed, get all that concerns him in the compass of 320 pages.

As specimens of the acts of which he would be relieved, we will mention the title of one act of each of the classes which should be severed from the "public general English." Among the public general we may name, in the Scotch series, "An "Act to Consolidate the Statutes relating to the Constitution "and Completion of Titles to Heritable Property in Scotland, "and to make certain Changes in the Law of Scotland relating "to Heritable Rights;" in the Irish series, "An Act to amend "the Law relating to Reformatory Schools in Ireland;" in the colonial series, "An Act to make provision for the Appoint- "ment of Members of the Legislative Council in New Zealand,

"and to remove Doubts in respect of past Appointments." Among the public special we find of the "annual" acts, "An "Act for punishing Mutiny and Desertion, and for the better "payment of the Army and their Quarters;" of the legis- "lative warrants," "An Act for extending the Provisions "of the Thames Embankment and Metropolis Improvement "(Loans) Act, 1864, and for amending the Powers of the "Metropolitan Board of Works in relation to Loans under "that Act;" and of the "local and personal," "An Act to "settle an Annuity upon Sir Robert Napier, G.C.B., G.C.S.I., "and the next surviving Heir Male of his Body, in con- "sideration of his eminent Services." With none of these acts has the English lawyer, it is submitted, any more concern than he has with the French Code, or with the Marquis of Westminster's title deeds.

If the principle of classification which we have just described would be beneficial when applied to each year's legislation, still more striking results would follow from its application to a revised edition of the whole of the statute law. The statute book may, as we have already stated, be reduced by the omission of repealed and spent enactments from fifty volumes to eight or ten volumes. But these again may be cut down, perhaps by one-third, by the omission of all acts which, although "public," are not also "general," according to our use of the term. And this decrease in bulk would be accompanied by an increase in usefulness. The true laws, of which the collection would exclusively consist, would be more accessible from being disencumbered of all enactments of a different character. But the work would be rendered still cheaper and more convenient by being broken up, like the annual issue, into an "English," a "Scotch," an "Irish," and a "Colonial" series. There is no reason why an English lawyer should be compelled to load his shelves with the statute law of Scotland any more than with the "code civil" of Lower Canada, merely because Scotland, like Canada, is subject to the crown of England. It is a mere accident in the question that the Scotch statutes are made by the same Parliament which passes statutes for England. There should doubtless be a monumental edition, for historical re-

ference, of every public statute, whether general or special, which has been passed since Magna Charta; but for legal purposes there should be an edition weeded of everything which is not general law, and divided into four series—the English, the Scotch, the Irish and the Colonial. The reference of each bill, on its introduction into Parliament, to its proper class, and its numbering, on becoming an act, according to its position in that class, would of course require some new administrative machinery, but this might be of the simplest kind. If method were introduced into the promulgation of new laws, it would no longer be possible to frame a statute, as is now constantly done, part of which is a true general law, and part of which deals entirely with private rights. Glaring examples of this error are not wanting among the acts of last session. Chapter 99 is mainly for the purpose of continuing a long list of private turnpike acts, but it also meddles with the general law of turnpikes and highways. On the other hand, chapter xlvi. of the Local Acts not only confirms certain provisional orders, but also amends the Pier and Harbour Act, 1861. The line between the so-called "public general" and the "local and personal" acts is also most uncertain. Among the latter is (c. cxiii.) an act to repeal the Gun-barrel Proof Act of 1855; so is (c. lxxx.) an act regulating Metropolitan Subways. An act regulating Metropolitan Streets (c. v.) is, however, a public general act. Again, temporary and permanent enactments are intermingled in the most confused manner. The first half of the Registration Act (c. 58) relates to the registration of the year 1868, and is therefore already obsolete; the latter half affects the law of the subject permanently. Briefly to recapitulate, we would urge upon the Government to determine upon dividing the statutes into "public" and "private;" then, leaving the private acts without any attempt at classification, to subdivide the public into "general" and "special;" and to break up the "public general" into four series, to be distinguished as the English, Scotch, Irish and Colonial. This arrangement not only to be carried out in the case of the annual volume of new statutes, but also to be made use of in selecting the contents of the revised edition of all the statutes. Such edition to

consist solely of "public general" acts, and to be broken up into the four series above mentioned.

Were these measures carried out, the first step would have been taken towards the improvement of the form under which the law of England is manifested. In the case of the statutes at least, the jurist would be able to say, "In these four or six "volumes" (as the case might be) "is contained the whole of "the general law operative in England." Knowing precisely what the law is, and where it is to be found, and discerning moreover that its actual dimensions are by no means formidable, he would then be in a position to address himself cheerfully to the next stage of progress—to attempt to arrange the statutes in a rational, instead of a merely chronological, order.

If law reformers could only be persuaded to define their terms and plan their course beforehand, their success might be both rapid and durable. Their ill-guided efforts at present serve only to make confusion worse confounded. Till they adopt a better method, the statute book must remain, like every other department of English law, a mere chaos through which wayfarers are misguided by a cumbrous and itself chaotic index.

VIII.

The Pitfalls of the Statute Book.

(*From the Saturday Review, 17th July*, 1869.)

THE PITFALLS OF THE STATUTE BOOK. (a)

A SCENE occurred the other day in the Court of Common Pleas sitting at Guildhall which ought to be impossible in a civilized country; and it is so instructive an instance of the wholly unnecessary difficulties which are thrown in the way of the administration of justice in England, that it ought not to be passed over in silence. An action was brought by one Susan Varley against the publisher of the "Daily Telegraph" for penalties. The plaintiff's case was, that the "Telegraph" had inserted certain advertisements by which inquiry was made for goods which had been stolen, and in which the owners undertook, that if the goods were returned, no proceedings should be taken against the thieves; such advertisements being illegal, as tending to the compounding of felonies. The jury was sworn, the judge was all attention, and the plaintiff's counsel told his story with all due elaboration. Witnesses were called from Government offices and from coffee-houses where newspapers are filed, to prove that the copies of the "Daily Telegraph" produced in court were really copies of the periodical which emanates from 135, Fleet Street, and that the proper persons had been sued for the delinquencies of that journal. The witnesses were duly cross-examined, the regulation jokes were bandied about, and "a laugh" was of course raised when inquiries were made as to the real existence and the habits of the plaintiff; "did she," for instance, "live up two pair of "stairs?" The case looked very black for our lively contem-

(a) *Saturday Review*, 17th July, 1869.

porary, when the counsel for the defendant rose and made an objection to the evidence. The judge did not think much of this. The learned counsel had, however, a further objection, which certainly seemed to go to the root of the matter. He submitted, "that the statute upon which the action was founded "had been repealed by the 7 & 8 Geo. 4, c. 27. The first sec- "tion of this last act recited that it was expedient to repeal "various statutes, and it repealed so much of the act in question "'as relates to advertisements therein prohibited.'"

The report of the case in the "Telegraph" reads on smoothly enough, but here must doubtless have occurred an awkward pause, which might well have been represented by a couple of lines of asterisks. Everybody seems to have been taken aback. The counsel for the plaintiff, who had so far steered their case triumphantly, must have been especially nonplussed. The leader must have turned sharply round on his junior, and some elementary work on criminal law must have been in instant demand. The briefless barristers in the second row must have put their heads together, and tittered and buzzed learnedly. Even Mr. Justice Keating on the bench must have wished that he had even as much as "Archbold's Practice" near to hand. All this must have happened, and might have been represented in the report by two lines of asterisks. One and all, however, of the parties concerned, when they recovered from the shock, seem to have put the best face upon their own ignorance, and to have looked kindly on the ignorance of their neighbours. The plaintiff's counsel, Mr. Serjeant Robinson, said that "his "attention had not been before drawn to the 7 & 8 Geo. 4, "c. 27, and he had not been aware of its contents." The judge observed, that "this was no discredit to the learned ser- "jeant, for Lord Coke himself had said that he did not know "all the statute law, though he added that he should be ashamed "to say that he did not know all the common law. He (Mr. "Justice Keating) must say he did not know the statute of "George IV." And even the defendant's counsel, Mr. Giffard, the lucky discoverer of the awkward fact, was kind enough to say, that "he would not say how long he had known it." Then Mr. Serjeant Robinson added, that he "was informed that this

" matter had been thoroughly investigated, and that the provi-
" sion upon which the action was founded had not been repealed."
Mr. Justice Keating remarked, that " the statute of George IV.
" stated in the preamble that it was expedient that certain acts,
" and parts of acts, enumerating among others the one sued on,
" should be repealed, in order that the provisions contained in
" them might be amended and consolidated into one act. Now
" the question was, had they been consolidated into one act?
" It certainly looked like a provisional repeal. He thought
" that the case was clear enough upon the facts, and that the
" question of law should be further looked into." After some more discussion the judge was inclined to direct a formal verdict for the plaintiff, but the defendant's counsel pointed out that, " even if his lordship's impression were well founded, that
" the enactment still existed in another statute, that would not
" entitle the plaintiff to recover, for he expressly founded his
" action upon the statute named in the declaration; and no
" judge, he apprehended, would amend in such a case." Eventually a formal verdict was entered for the defendant, with leave to the plaintiff's counsel to move the full court to vary the verdict in accordance with what might be held to be the true state of the law. Some time in November next we may therefore expect a solemn argument before the Court of Common Pleas at Westminster upon the question, amongst others, whether the statutable prohibition of such advertisements as those complained of has been removed or not (*b*).

This question ought clearly never to have arisen. We have not a word of blame for the judge or the plaintiff's counsel in the case. As things now are, press of business must sometimes oblige eminent counsel to open a case without having devoted sufficient time to it to enable them to ascertain that the statutes upon which it is founded have not been affected by subsequent legislation; and the judges have frequently disclaimed that thorough knowledge of the statute law off-hand which, by a pleasing fiction, is supposed to be imprinted on the minds, not only of judges or barristers, but of all the Queen's subjects. What we do complain of is the confused state of the law which

(*b*) The court was moved accordingly, but refused to amend the declaration.

is disclosed in the story which we have culled from the reports of the Guildhall sittings. Many legal principles must necessarily remain involved in much obscurity. The common law is a wide and ill-surveyed field; but the question whether or not there exists any statutable prohibition of a particular act is, in its nature, of the simplest possible kind, and ought to be capable of instant solution. How very far this is from being the case will sufficiently appear from a statement of the course of legislation with reference to such advertisements as were alleged to have been inserted in the "Daily Telegraph." They were made penal by a temporary act, 25 Geo. 2, c. 36, s. 1, which was made perpetual by 28 Geo. 2, c. 19. These acts, so far as they related to the advertisements in question, were repealed by 7 & 8 Geo. 4, c. 27; but new provisions, similar to those which had been repealed, were contained in c. 29, s. 59, of an act passed in the same year. The last-mentioned act was wholly repealed by 24 & 25 Vict. c. 95, but new prohibitions of the obnoxious advertisements were enacted in s. 102 of c. 96 of the same year, commonly called "The Larceny Act, 1861." Finally, sects. 1, 9, 11, 12 and 15 of 25 Geo. 2, c. 36, and the whole of 28 Geo. 2, c. 19, were repealed by 30 & 31 Vict. c. 59. This is obviously a labyrinth through which no judge can be expected to thread his way at a minute's notice, and with no law library at hand, in the course of a trial at Nisi Prius. If he calls for the statutes of Geo. 2, they confront him with no indication that they have ever been interfered with by subsequent legislation; nor is there any authoritative index by which he could discover the actual state of the statute law upon any given point.

The results of this state of things are ludicrous as well as vexatious. It is unseemly as well as inconvenient that the legislature and the highest courts of justice should be employed in repealing what has been repealed long ago, or in discussing what has been settled beyond dispute. But these things not unfrequently happen. Three statutes which had been repealed by 1 & 2 Vict. c. 48, were solemnly repealed again by 21 & 22 Vict. c. 26. In 1842 the Court of Queen's Bench, in the case of *Reg.* v. *Great Western Railway Company*, listened to much

argument, and delivered an elaborate judgment upon 2 & 3 Edw. 6, c. 24, little suspecting that it had been repealed by 7 Geo. 4, c. 64, s. 32. Such absurdities cannot be avoided as matters stand, but they might be rendered impossible with the greatest ease. We have on previous occasions mentioned the steps which have been taken by the Government towards remedying the evil, by placing in the hands of the profession and the public, in a manageable compass, the statute law which is actually in force. But the work has taken more years than it need have taken months, and it seems to be the business of no one in particular to see that it is accomplished. The latest information upon the subject is contained in a speech made by Mr. Gladstone, in reply to Mr. Hadfield, on the 4th of last month. We thence gather that in July, 1868, Lord Cairns, who was then Chancellor, requested Sir J. S. Lefevre, Sir T. E. May, Mr. Rickards, Mr. Thring and Mr. Reilly to act as a committee to superintend the publication of a new edition of the statutes, the editor of which is to be Mr. A. J. Wood. We also gather that the first volume of the work will be published as soon as the committee has come to terms with the Treasury, whenever that may be, and that a chronological table of all statutes, and also an alphabetical index of those now in force, will shortly be produced. These measures are something to be thankful for, as far as they go; though, for reasons which we have explained in former articles, we are of opinion that the principles upon which the new edition is being constructed are by no means satisfactory, while the annual issue of the statutes continues to exhibit almost every fault which can attach to a collection of laws. The fact is that the subject is only taken up by the Government of the day at odd moments when it has nothing else to do, or when inconvenient questions are put by inquisitive private members. It used to be said that Nelson's column in Trafalgar Square was being leisurely completed by the occasional exertions of a man and a boy; and the reconstruction of the statute book seems to be carried on in an analogous manner. Several acts have been passed of late years expressly repealing obsolete statutes enacted from the earliest period down to the year 1861. Some of this work has to be

done over again upon a more thorough system, and a bill is to be introduced for the purpose. A bill is also to be introduced in order to get rid of obsolete acts passed between 1861 and the present day, but Mr. Gladstone was obliged to tell Mr. Hadfield that this latter bill cannot be proceeded with at present, "because exertions were directed to the earlier period of the "statutes before 1861;" as if, by employing a sufficient number of hands, the two bills could not be proceeded with simultaneously. The tone of Mr. Ayrton's speech upon the same occasion, on behalf of the Treasury, gives us little hope of any rapid progress being made, or of any determination having been arrived at to give the profession and the country what really is needed. After stating that it was proposed to publish a collection of such statutes as have not been repealed, he proceeded to say that, "if the House wished for a digested edition of the statutes, that would be more difficult, and would require more time. Some gentlemen even required to have the statutes codified, but that would take years." The Government are quite right in their method. First, we must know what is the extent of the statute law now in force, then we want the statutes digested under proper heads, and, lastly, those digested statutes should be consolidated. But what the Government fails to comprehend is that these operations ought to be determined upon and commenced, and that it is quite possible to accomplish them speedily. It is with the hope of preventing this important and simple measure of reform from going quietly to sleep again for two or three years more that we have thought it right to call attention to the case of *Varley* v. *Ellis* as exemplifying the way in which delay and expense are every day caused by the impossibility of readily and surely ascertaining what is the statute law upon any given topic.

IX.

The Classification of the Statutes.

(*Read before the Jurisprudence Department of the Society for the Promotion of Social Science, 19th April*, 1869.)

THE CLASSIFICATION OF THE STATUTES. (a)

In the first place I have to thank you for permitting me, though not one of your members, to address to you the paper which I am about to read. I have sought the opportunity of doing so in the hope that the reform which I advocate may receive the support of your learned society, or, at any rate, of some of its individual members who have seats in Parliament.

The question to which I shall ask your attention, while it is of well defined and manageable dimensions, is, I venture to submit, of considerable interest. Although my remarks will deal exclusively with the statutes, it is certain that the importance of these, relatively to that of the other sources of law, becomes greater every year; and although I shall discuss the statutes with sole reference to the form in which they are promulgated, it is surely with this, rather than with the matter which they may contain, that a jurist has most concern.

The profession, at any rate, if not the country at large, has at length become ashamed of the inaccessibility of the sources of our law, and seems determined to remedy the evil. To digest the treasures of case law which lie hidden in the reports must, however, be a work of many years, but that the statutes should in the meantime continue to be unknowable, is a scandal which might be avoided with the greatest ease.

I am far from saying that nothing has yet been done in this

(a) Read before the Jurisprudence Department of the Society for the Promotion of Social Science, 19th April, 1869.

direction. Long before the Digest Commissioners had commenced to deliberate upon the possibility of a general recast of the law of England, steps had been taken to remedy one of the greatest defects of the statute book—I mean the intermixture there of dead law with living—and by means of a series of measures, mainly due to Lord Westbury, this defect is all but cured. When the last of the expurgation acts shall have been passed, we may hope before long to possess an edition of the living statute law contained in, say, ten volumes, instead of the 150 or thereabouts, which at present entomb dead law and living together.

Much will then have been gained, but much more will remain to be done, before the results of direct legislation are presented to the country in a satisfactory shape. My object in the following remarks will be to suggest the improvements which will still be needed, both in the general body of our statute law and in the annual issue of new statutes.

I. The first necessity is to determine what acts should, and what acts should not, form a part of the statutes of the realm. It is obvious that this collection should not include every act of parliament. No one imagines that railway or canal acts stand upon the same level with, say, the Wills Act or the Common Law Procedure Act. The State not only passes laws, but also supervises and re-arranges the rights of individuals; *e. g.*, it will remake a man's will, remodel a marriage settlement, or oblige the proprietors in a certain district to sell their estates at a fair price to a railway company. The so-called private bill legislation is not really law-making; and a line has accordingly been drawn, above which are the "public general acts," usually known as "The Statutes" *par excellence*, and below which are various classes of enactments of an inferior character. Upon what principle, however, this line is drawn; whether it has always been drawn upon the same principle; what is the precise meaning of the word "public," and what of the word "general," in this connection, are questions which very few, even among lawyers, have ever asked themselves, and which no one can truly answer except by saying that the line has been

drawn upon no distinct principle, and that the terms "public" and "general" have no definite meaning.

The term "public" has been used in at least three different senses, as implying—passed for State purposes—passed at the public expense, and—judicially noticeable.

The first of these senses is the oldest. As far back as the reign of Henry VI., "commune" are opposed to "particular" bills. The same distinction was expressed in the time of James I., by the phrases "general" and "private;" and shortly afterwards by the terms "public" and "private;" and its meaning is clearly stated in what became the usual formula of enrolment. This, after setting out the "Publique Actes," proceeds as follows: "*Item, quædam petitiones privatas per-sonas concernentes, in se formam actus continentes, exhibite fuerunt dno regi Parl. pdct., quarū tituli subscribuntur, viz.,* '*private actes.*'"

The distinction thus drawn is accurate and intelligible. The public (otherwise called common or general) acts are passed for state purposes. The private acts are mere concessions to the prayers of individuals, in matters touching their private interests.

Another sense of the terms public and private however crept in, and involved the whole subject in a confusion from which it has never emerged. Only public acts were at common law judicially noticeable; but, at least as early as the reign of James I., certain private acts were put upon the same footing, by inserting into them a special clause declaring them to be public and judicially noticeable (*b*). Thus, upon the border land of public and private acts there grew up the class of local and personal acts declared public; opposed on the one hand to the public acts proper, or as they now began to be called, the public *general* acts (*c*), and upon the other to the private acts proper.

Under this classification, the term "public" had evidently shifted its meaning, and had come to signify "judicially notice-able"; while, among the judicially noticeable acts, those

(*b*) As to the effect of which, see *Brett* v. *Beales*, Moo. & Malk. 423.

(*c*) First in 38 Geo. 3.

which were really of a public character were distinguished as "public general." The act of the present reign (13 & 14 Vict. c. 21, s. 7), which made all acts thereafter passed public, in the sense of judicially noticeable, unless the contrary were expressed in them, did not affect this classification. The only result was, that thereafter the special clause in local and personal acts making them public was omitted, and the converse clause was inserted into such acts as were not intended to be public. The Queen's printers continued, nevertheless, to describe the local and personal acts in their title page as being "declared public," which was not the case, because it was no longer necessary. They ceased to do so a year ago, not for this valid reason, but doubtless because they were instructed at that time to mark certain acts among the local and personal with a large P, as being "public;" and the following dilemma must have at once presented itself to their minds—If these acts are, as we have hitherto entitled them "public," how can some of them be so pre-eminently public as to deserve the affix of a capital P? If, on the other hand, these acts are not public, why are they not ranked with the private acts? The printers evaded the question by entitling these acts simply "local and personal," or in some of their editions simply "local," leaving unsolved the problem whether they are public or private. The fact is that they are public in the modern sense of the term as being judicially noticeable, but private in the ancient sense of being passed in the interest of private persons.

I have ventured to occupy you so long in unravelling this ambiguity, because its existence affords a strong argument in favour of the conclusion which I am anxious to enforce upon you—the necessity, that is, of clearly defining the terms upon which legal classifications depend.

Without definition of terms there can of course be no division, and when we see what confusion prevails in the use of the terms "public," "private" and "general," we cannot be surprised that the statutes are annually grouped as "public," as "private" and as "local and personal," which is apparently supposed to be a *tertium quid* between public and private. This is, however, a sheer impossibility, for "private," as applied

to statutes, certainly means neither more nor less than non-public. Nor is it wonderful that certain of the local and personal acts have been ordered to be distinguished with a P as being public; whereas, either the whole class of such acts is public, in which case it is absurd to point out that some of them are so public as to deserve a mark denoting the fact; or this class is not public, in which case it is needless to have a class of "public *general*" acts, if there are no public acts that are not general.

Of the several meanings therefore of the word "public," which should be selected, and when selected steadily adhered to? Since the recent act, so few statutes are not judicially noticeable that their being so or not is far too insignificant a point to determine their classification. This use of the term "public," always unfortunate, should therefore now be dropped, and a "public act" should henceforth mean an act passed for state objects, of which probably the best criterion is that it was also passed at the expense of the state. It would then at once be obvious that the local and personal series is of a private nature; and the term "public" would cover all those acts which are now entitled "public general;" for there being no longer any "public" local and personal acts, to continue to describe the public acts as public general would be an unnecessary tautology. A hard and fast line should therefore be drawn, above which would come the "public acts," *i. e.*, all such as are passed for state purposes, and are now called "public general," and below which would come the "private acts," *i. e.*, those passed in the interest of individuals, comprising those now called "local and personal," as well as those now specifically described as "private."

The only distinction *inter se* between the acts below the line is that, while most are judicially noticeable, some few are expressly excepted from this advantage; but all have the common characteristic of being mere concessions of privilege to individuals, not enactments passed for state objects.

I will not trouble you at length with my reasons for inclining to restore, nearly to their original position, the acts which were

last year extruded for the first time from the "public general collection," receiving, as some compensation, the badge of a capital P. It will be enough to state that these acts were degraded principally on account of their enormous length, but this might easily be cured by drawing them (as an act was drawn last year confirming certain orders of the Ecclesiastical Commissioners) with a mere reference to the number of the "London Gazette" where the orders which they confirm are set out in full. And it seems very important that the existing criterion of a public act, viz., that it is passed at the public expense, should not be interfered with.

The various classes of private acts should be printed and published much as at present, and would require no further organization.

The public acts should be published in a collected form (just as the "public general" acts now are) by way of a monument of English history.

So far we have only put the distinction which already exists between acts which are included in, and those which are excluded from, the statute book upon a rational basis: and have cleared up certain ambiguities in the use of the term "public." But the "public acts" themselves would contain a great deal of matter that is not law, properly so called, and I am thus led to inquire, in the second place, how the laws, which in the public statutes are commingled with matters which are not laws, should be extricated from this commixture, and thus be rendered at once more accessible and more intelligible.

II. We have, therefore, to determine which among the public statutes, *i. e.*, the acts of the state passed for state objects, are really laws, and which are other exercises of the sovereign power. Parliament is not only an organ for making laws, it is also an organ for drawing cheques, carrying out public works, granting indemnity, and rewarding merit. It will, I think, be found that by a new use of the word "general," and the introduction of its correlative "special" (*d*), we shall be enabled to

(*d*) The use of this term in the sense assigned to it by Lord Coke (4 Rep. 76), seems to the author quite unnecessary and misleading.

break up the mass of public acts into two groups, one of which may be rejected from a body of law.

Now it will be found that the enactments contained in any given volume of the statutes may be distributed under the following heads:—(1) annual acts for carrying on the machine of government, *e. g.*, the Mutiny and Consolidated Fund Acts; (2) those which, though passed upon public grounds, affect only definite individuals or places, *e. g.*, to settle a pension on Lord Napier, or to discontinue Salford Gaol; (3) those the operation of which is exhausted in carrying out a definite object, *e. g.*, in building a new Foreign Office, or executing an inquiry into the policy of trades unions; (4) those which impose true general permanent laws upon the nation, *e. g.*, in matters of bankruptcy or divorce.

We would propose to distinguish the first three kinds of acts as "public special"—special, that is, either (1) in time, (2) in person or place, (3) in object; the fourth kind alone would we admit into the collection of "public general statutes,"—"public" as being passed for state purposes, "general" as imposing true laws on the community.

The "public general" statutes would alone be admitted into the statute book proper, because they alone have in truth any right to a place in a body of law. What an enormous saving of bulk would be effected by drawing this distinction will presently be shown by examples.

III. We have thus re-drawn the line between "public" and "private" acts, and we have distinguished the public acts which are really *laws* by the epithet "public general;" all other public acts falling into the "public special" category.

But the public general acts are susceptible of a further subdivision. The accident of the English Government being at the head of a vast colonial empire is no valid ground for encumbering the English statute book with those colonial laws which it happens to be necessary to pass in the imperial legislature. Laws affecting Canada only, or India only, must of course be officially printed, and must not only be communicated to such parts of the world as they may concern, but must also be accessible in England, because England contains the supreme legis-

lature, executive, and court of appeal of the empire. Such enactments, however, form no part of the law ordinarily administered in our courts of justice, and should form no part of our statute book. The same reasoning applies to laws affecting only Scotland or Ireland. There is no reason why an English lawyer should be compelled to load his shelves with the statute law of Scotland, any more than with the "code civil" of Lower Canada, merely because Scotland, like Canada, is subject to the Crown of England. It is a mere accident in the question that the Scotch statutes are made by the same parliament which passes statutes for England. The public general acts should therefore be divided into four distinct series, containing respectively, "English," "Scotch," "Irish," and "Colonial" statutes. Enough will have been conceded to the majesty of the empire if the full edition of the "public" series of statutes contains Scotch, Irish, and Colonial, as well as English acts. Convenience and logic alike require that for judicial purposes statutes affecting distinct bodies of law should also be published separately.

IV. The public general English statutes having thus been newly defined and reduced to a very manageable bulk, should be, with all convenient speed, consolidated under appropriate heads. Numerous topics have been thus treated already, and if once a really scientific system of classification were adopted, the labour of fitting the remaining topics into their proper places would turn out to be less than might have been expected. The question of the method proper for a statute book, or indeed for any body of law (for there is but one true method), is beside our purpose, nor can we enter upon a discussion of the relation of such a statute book, or statute digest, as we have described, to the digest of case law, or of the whole of the sources of our law, which may be produced many years hence; or of the mode in which the two digests will ultimately become one.

V. It remains, however, to point out the manner in which the results of new legislation should be annually presented to the public. The hundreds of acts which each year receive the royal assent should be classified, upon their introduction into

parliament as bills, under the heads under which we propose to arrange the previously existing statutes. That is to say, they would rank, in the first place, as "public" or as "private." The private acts would be left without further organization, and printed just as they are at present. The public acts would be published collectively, as a monument of the history of the year; but for legal purposes they would be divided into "public general" and "public special;" and the public general would be broken up into four series, known as the "English," "Scotch," "Irish" and "Colonial" respectively.

Such acts only as belonged to the "public general English" category would be destined to form an integral portion of the law of England, and with this view would all be drawn upon a regular model, and with express reference to the particular portion of the previously existing consolidated statute law which would be affected by them. The phraseology to be employed might be something of this kind: "Be it enacted, that the "statutes of England, book iii., tit. vi., ss. 12, 13, 14, shall be "repealed, and that instead thereof, the said sections shall run "respectively as follows, that is to say," &c.

The effect of such legislation might, with the greatest ease, be noted up on the margin of the statute book; new editions of which ought to be issued from time to time by authority, say at intervals of ten years; each new edition superseding the previous one, and embodying the results of the ten years' legislative changes. Special officials must of course be appointed to scrutinise all bills, with a view to referring each to its proper class, and to ensuring that nothing is introduced into a bill of one class which is appropriate to bills of another, *e.g.*, that no enactments of a merely special character are introduced into a public general act, and *vice versâ*. It would also be the duty of such officials to see that the public general acts (for all others might be left to the devices of private draftsmen) were drawn in accordance with a regular formula, and with reference to a particular book, title and section of the previous statute law.

The arrangement which I have attempted to describe would, if adopted, necessarily produce a marvellous diminution in

the bulk both of the general body of the statute law of England and of the additions which are annually made to it; such a diminution implying, of course, increased cheapness and accessibility. It would also lead to a more careful drawing of new public acts so as to prevent the admission into them of any merely private matters; and it would define beforehand the precise portion of the statute law which would be entitled to a place in any future digest or code of the whole law.

The extent to which the bulk of the statute book might thus be cut down will readily appear from an analysis (upon the principles of the proposed new method of arrangement) of the volume of so-called "public general" statutes for last year. This volume, with which every lawyer is obliged to encumber himself if he would have any authorized statement of the legislation of the year, contains 130 acts, occupying 1,150 pages. Only 320, however, of these pages are occupied by true laws having any operation in England; 358 pages are occupied by Scotch, 121 by Irish and 11 by Colonial acts, of a public general character. The rest of the volume is occupied by what under the proposed nomenclature would be called "public "special" acts, and of these the annual acts fill 209 pages, what may be called the "legislative warrants" 66, and acts affecting only definite persons or localities 104.

Instead, therefore, of having to purchase a volume of 1,150 pages, the English lawyer would, under the new system, get all that concerns him in the compass of 320 pages(*e*), and this result would be attained by no merely empirical selection of practically useful statutes (such as we get in the collections edited by Chitty and Paterson, or in the abridgment provided by the "Law Journal"), but by rigid adherence to a scientific and predetermined system of classification.

The society would doubtless prefer that a full analysis of the acts of last session, which I have made in order to show how they would be redistributed according to the proposed plan, should be taken as read.

Some of you, gentlemen, may think that I attach an ex-

(*e*) Of the 1,483 pages contained in the volume for the preceding year, only 270 pages were occupied by permanent and general English laws.

aggerated importance to a good classification of the statutes, in fact, the old fashioned English lawyer's idea of a satisfactory body of law was a chaos with a full index. I believe, however, that this was just the weakest point of the old fashioned lawyer, and that to introduce logical method into any one department of our law would be to confer upon it the greatest possible benefit—a benefit too which would spread ere long to other departments. Some persons may, however, be inclined to concede that method is an admirable thing, and to own that it might well be applied to the statute book, but may nevertheless be inclined to await contentedly the appearance of the new edition which has so long been promised by government, in the full belief that in it their aspirations will be realized. It may certainly be hoped that the official mind is better trained now in such matters than it was some years since, but all who are sanguine about the results of the meditations of those in power would do well to glance at a classification of acts of parliament which is adopted, apparently without misgivings, by no less learned a body than the "Statute Law Consolida-" tion Commissioners," in their third report (*f*).

The cross-divisions in their scheme are such as must shock every well regulated mind. I venture, therefore, on the ground both of the importance of the subject, and of the possibility that it may not be satisfactorily treated by the legislature, to ask this Society to give it their best consideration.

Analysis of the Statutes of 1868, showing the proposed redistribution.

		No. of Chapters.
Public, General.	English Series	53½
	Scotch	16
	Irish	21
	Colonial	6
Public, Special.	In time	12
	In Person and Place..	18
	In Object	3½
Private ..	.. ..	171

(*f*) *Vide supra*, p. 118.

List of the Public General, English, Statutes.

No. of Act.	Subject.	Chapter at present.	No. of Act.	Subject.	Chapter at present.
1	Sales of Reversions ..	4	27	Liquidation	68
2	Metropolitan Streets ..	5	28	County Courts, Admiralty.	71
3	Disfranchisement ..	6			
4	Receipts, Public Departments.	9	29	Promissory Oaths ..	72
			30	Customs Officers' Votes	73
5	Chancery Procedure ..	11	31	Divorce..	77
6	Railways	18	32	Admiralty	78
7	Prison Officers.. ..	21	33	Railways	79
8	Lock-ups	22	34	Army Chaplains ..	83
9	Capital punishment ..	24	35	Marine Policies ..	86
10	Cotton Statistics ..	33	36	Copyhold Commission .	89
11	Duchy of Cornwall ..	35	37	Public Departments and Excise, &c.	90
12	Alkali	36			
13	Evidence	37	38	Bankruptcy	104
14	India Prize	38	39	Metropolitan Fairs ..	106
15	Partition	40	40	Indictable Offences ..	107
16	Elections	41	41	Church Rates	109
17	Building Sites	44	42	Telegraphs	110
18	Sea Fisheries	45	43	Ecclesiastical Commissioners.	114
19	Parliamentary Boundaries.	46			
			44	Sanitary	115
20	Churchyards	47	45	Larceny	116
21	Fairs	51	46	District Churches ..	117
22	Gaming	52	47	Railways	119
23	Judgments	54	48	Pharmacy	121
24	Petroleum	56	49	Poor	122
24½	Registration	58 Pt. II.	50	Inland Revenue ..	124
			51	Election Petitions ..	125
25	University Elections ..	65	52	Merchant Shipping ..	129
26	Metropolitan Police ..	67	53	Artisans' Dwellings ..	130
			53½	Total (occupying 320 pages).	

N.B.—Metropolitan Acts are included in this list.

ADDITIONAL NOTE.

THE following letter, addressed by the author to the "Solicitors' Journal," may serve to make clearer one or two points in the preceding paper:—

Sir,

I am glad that you devoted an article on Saturday last to the subject of the "Classification of the Statutes," and am sure that, although the views which I have expressed upon the subject, and which served as a text for your remarks, do not meet with your entire concurrence, you will allow me to say a few words upon the objections which you state to such a classification as I propose.

(1.) You truly say that many acts which ought by no means to be forgotten, such as the Act against the Provost of Edinburgh in 1737, would be omitted from such an edition as I advocate of "Public General English" statutes. But I by no means propose to burn, or in any way render less accessible, the whole body of old statutes, whether in force or no. This magnificent series of state papers should always, as now, enrich the shelves of all great libraries. What I ask is that out of this series of records there should be officially selected such acts as are really contributions to the body of our laws, as opposed to those which are merely landmarks of history. It is, for instance, very interesting to trace the history of the law of bankruptcy in a full edition of the statutes at large; but this is no reason why an authoritative law book should not exist containing the law of bankruptcy actually in force, and not a word more about it.

(2.) You admit that my proposed sub-division of the "Public General" statutes "may be convenient for the English lawyer;" but you proceed to say that it would be insufficient. I propose that the English lawyer should be relieved of acts which have no operation except in Scotland, Ireland, and the colonies. You suggest that, upon my principles, the "English statutes" should again be broken up into a "common law" and "equity" series. But surely, because I wish to sub-divide, I am not obliged to sub-divide *ad infinitum*. If equity and common law were distinct bodies of law, I would certainly propose to have a body of equitable and a body of common law statutes; but, fortunately, we are not quite in such evil case as this. This objection, if it is seriously urged, is, however, answered by what I say as to digesting the body of statute law as soon as we have ascertained what laws they are which we wish to digest.

(3.) Your remarks upon the methods of citation I do not quite understand. I should, of course, propose to refer to the statutes by book, title, and chapter, only after they had been digested and consolidated; and after they have undergone these processes the date of their original enactment will be wholly immaterial. New statutes must still be cited by reference to the time of passing, and I should

prefer to do this, as is done in India, by talking of Act 10 of 1869 instead of 32 & 33 Vict. c. 10.

I will not trouble you with any recapitulation upon digesting and other processes which should follow upon a re-classification of the statutes. One step at a time in such reforms is all that can be hoped for.

Temple, July 14, 1869.

Some strictures, by Mr. Chisholm Anstey, upon the author's proposals, may be found in the Sessional Proceedings of the Social Science Association, vol. 2, p. 415. It may be thought surprising that this gentleman, who has done good service in the cause of Statute Law Reform, should fail to grasp the distinction between a statute which establishes a general rule of law, and one which merely confers a right on individuals. But since this is the case, and since even the decisions of the superior courts have not always been free from confusion upon the point (*a*), it may be worth while to indicate the difference between the two kinds of acts of parliament.

Both are of course, in one sense, of universal obligation. Any sailor when he comes into, say, Ramsgate Harbour, is as much bound by the bye-laws of that harbour, made under parliamentary powers, as he is by the general law regulating merchant shipping.

The difference is, that wherever he goes as a sailor he is subject to the general law, while, unless he chooses to enter Ramsgate Harbour, he has nothing to do with the regulations of that port. It is impossible to make accessible to all persons a statement of the special rights and obligations which conceivably may attach to them in every railway train, manor, borough or mine within the four seas; but this is no reason why we should not attempt to make accessible to them the general law under which they live wherever they go.

It is true, as Mr. Anstey observes, that an apparently special act occasionally contains a fragment of general law. This scandal has often been pointed out by the author (*b*), and it would cease to exist under a methodical system of legislation (*c*).

(*a*) See *Barnet* v. *Cox*, 9 Q. B. 617.
(*b*) *Supra*, pp. 130, 149; *cf. infra*, 175.
(*c*) *Supra*, pp. 149, 169.

The Statute Book for 1869.

The Law Reports' edition of Statutes for 1869 has been compressed into a considerably smaller space than its predecessors by the mechanical expedient of closer printing (cc. 117, pp. 650). It happens also to contain a larger proportion than usual of acts which are really general English laws.

An analysis, upon the principles already laid down (*d*), of the legislation of the year, gives the following results:—

	CC.	PP.
Public general acts, English . . .	67	372
„ „ Scotch . . .	6	14½
„ „ Irish . . .	11	56½
„ „ Colonial . .	13	23½
„ special acts . . . . (Including those marked P).	30	183
Private acts . . . . . (Including all "local and personal," except those marked P, as well as "private").	161	

The "public general English" Statutes of the year occupy therefore 372 pages.

It would be easy to point out faults in the mode in which many of the acts have been drawn—a few instances must suffice.

Cap. 90, "The Turnpike Acts Continuance Act," dabbles, as usual (sect. 7), in alteration of the general law of turnpikes (*e*).

Cap. 31, is a good instance of the way in which one anomaly leads to another. Although it is an act in confirmation of an order, it is not (as are now other acts of the kind, absurdly enough) relegated to the class of "local and personal," but is set out at length in its place among the so-called "public general" acts. It doubtless occupies this position because, out of two pages of obscure details relating to Langston Harbour, there occur four lines which permanently affect the general law of fisheries.

(*d*) *Supra*, p. 171. (*e*) *Vide supra*, p. 130.

The proper way to treat all acts in confirmation of orders, &c., is surely to retain the enacting portion among the public acts, but to make them in every case merely refer to the orders, &c., as set out in a schedule, deposited in official custody, and to be found printed in the "London Gazette." This has actually been done in the case of "The Land Tax Commissioners' Names Act" (c. 64), which occupies but one page, as against the nineteen pages occupied by the last act of the same kind (1867, c. 51).

APPENDIX.

APPENDIX.

THE following chronological memoranda of the steps taken of late years in England towards the formal amendment of the law may be found useful.

I. With reference to the whole body of the law :—

1863, June 12. Lord Westbury, C., took the opportunity, in introducing a bill for expurgating the statutes, to explain to the House of Lords, in a great speech, his plans for digesting the case law, and of ultimately organizing a Department of Justice. Hansard, vol. 171, 776.

1866, November 22. A Royal Commission was issued "to inquire into the ex- "pediency of a digest of law, and the best means of accomplishing that "object, and of otherwise exhibiting, in a compendious and accessible form, "the law as embodied in judicial decisions."

1867, May 13. The Commissioners made a first report, in which they stated their opinion that "a digest of law is expedient;" and recommended "that a por- "tion of the digest, sufficient in extent to be a fair sample of the whole, "should be, in the first instance, prepared" under their superintendence, and that means should be afforded to them of employing adequate profes- sional assistance for this purpose.

„ November 22. The Commissioners caused a letter to be addressed to the four Inns of Court stating that they proposed, with the authority of Her Majesty's Government, to proceed with the preparation of specimen Digests, such as they had recommended, of certain portions of the law, viz.:—

"(1) Bills of exchange, including promissory notes, bank notes, and "cheques.

"(2) Mortgage, including lien.

"(3) Rights of way, water and light, and other easements and servi- "tudes."

Members of the bar desirous of being employed upon this undertaking were requested to send in specimens of their work by the last day of Hilary term then next. Each competitor was to select one of the above subjects, and to submit—

"(1) A general summary in an analytical form of the whole law com- "prised under the head chosen by him.

" (2) A small subdivision of the same worked out in detail, as an example
" of the mode in which he would propose to fill up the outline
" furnished by his analytical summary.
" (3) Any general observations he may think relevant, respecting the
" execution either of the portion of the Digest that will em-
" brace the particular subject chosen by him, or of the Digest
" generally."

Specimens of work were accordingly sent in by 187 barristers, out of whom the Commissioners selected—

1868, June—Mr. Hen. Dunning Macleod .. for the Law of Bills of Exchange.
Mr. Will. Rich. Fisher.. .. for the Law of Mortgage.
Mr. John Leybourn Goddard .. for the Law of Ways, &c.

and these gentlemen are still engaged upon their tasks.

II. With reference specifically to the Statutes:—

1833. A commission on Statute Law Consolidation was issued by Lord Brougham, C. Its report, which appeared in 1835, contains a useful historical survey. (Parl. Papers, 1835, xxxv., 361.)

A commission for the consolidation of the criminal law was in existence from 1833 to 1849. It issued thirteen reports, but produced little further practical result.

1853. A temporary board, consisting of Mr. Bellenden Ker and four others was appointed by Lord Cranworth, C. It made three very interesting reports. (Parl. Papers, 1854, xxiv., 154, 363, 407.)

1854, Aug. 23. A commission was issued by Lord Cranworth, C., to a number of legal dignitaries, which caused experimental bills to be drawn upon various subjects, and had registers made of repealed statutes. It prepared the Expurgation Act of 1856, and made several reports. (Parl. Papers, 1855, xv., 829; 1856, xviii., 861; 1857, xxi., 203; Sess. 2, xii., 211; 1859, Sess. 2, xiii., pt. i., 1.)

1856, February 14. Sir FitzRoy Kelly, in introducing a consolidation bill, offered to superintend a consolidation of the whole Statute Book, subject by subject, which he thought might be accomplished in two years. Lord Stanley supported, showing that 790 Statutes might be reduced to 9.

The Attorney and Solicitor General (Sir A. J. E. Cockburn and Sir R. Bethell) insisted on the necessity of working in accordance with a previously proposed analytical outline of the whole subject. Hansard, vol. 141, 1084.

In this year was passed the 19 & 20 Vict. c. 64, which repealed a number of obsolete statutes.

1859, June 30. Sir FitzRoy Kelly spoke at length upon the subject. Sir R. Bethell (Attorney-General) doubted the expediency of longer continuing the commission. Hansard, vol. 154, 483.

1859, July 18. Lord Cranworth, in laying on the table bills consolidating the law relating to aliens, bills, executors, marriage, and registration of births, &c. (which did not become law), called attention to the fourth report of the commission, and recapitulated the work which it had done since its appointment by him in 1854. He recommended that some barrister of eminence should be placed at the head of it, and thought that the statutes might be consolidated in two years. Lord Campbell, C., declined to continue the existence of the commission. Hansard, vol. 154, 1370.

1860, February 17. Sir Richard Bethell (Attorney-General) stated to the House of Commons that he had engaged three gentlemen, one of whom would be employed upon the criminal, and two upon the civil statutes. They would first of all compile registers of obsolete acts, with a view to their repeal. Hansard, vol. 156, 1238.

1861, February 28. Lord Campbell, C., moved the second reading of the Expurgation Act, 24 & 25 Vict. c. 101., repealing the obsolete statutes from 11 Geo. 3 to 16 & 17 Vict. Hansard, vol. 161, 1057.

1863, June 12. Lord Westbury, C., introduced the Expurgation Act, 26 & 27 Vict. c. 125, repealing the obsolete statutes from Magna Charta to James II. Upon this occasion, as before mentioned, he made a great speech upon the whole question. Hansard, vol. 171, 776.

1867, May 28. Lord Chelmsford, C., in introducing the Expurgation Act, 30 & 31 Vict. c. 59, repealing the obsolete statutes between 1 Will. & M. and 10 Geo. 3, stated that he had requested Sir John Shaw Lefevre, Sir T. Erskine May, Mr. Thring and Mr. Reilly to report to him upon the best mode of making a complete index to the statutes; and that, in accordance with their advice, he had determined also to have an index of each year's legislation compiled by Mr. A. J. Wood. Hansard, vol. 187, 1198.

1867, May. A correspondence took place between Sir J. S. Lefevre and the Home Secretary (Mr. Hardy) upon the classification of the statutes.

1868, July. Lord Cairns, C., nominated a committee, consisting of Sir J. S. Lefevre, Sir T. E. May, Mr. Rickards, Mr. Thring, and Mr. Reilly, to make arrangements for the publication of a new edition of the statutes, to be edited by Mr. Wood.

1869, June 4. Mr. Gladstone, in answer to Mr. Hadfield, announced the appointment of the last-mentioned committee, and made other statements, as to which *vide supra*, p. 157.

(Upon occasions too numerous to specify Mr. Locke King and Mr. Hadfield have recalled the attention of the House of Commons to the reform of the statute book.)

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